

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BEFORE THE HONORABLE ALAN D ALBRIGHT
FINAL PRETRIAL CONFERENCE

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08:21 1 (January 4, 2022, 8:35 a.m.)

08:35 2 THE BAILIFF: All rise.

08:35 3 (Call to Order of the Court.)

08:35 4 DEPUTY CLERK: Final Pretrial Conference in Civil Action

08:35 5 W-20-CV-160, styled Theta IP, LLC versus Samsung Electronics

08:36 6 Company, Limited and Samsung Electronics America, Incorporated.

08:36 7 THE COURT: Good morning, everyone. If I could have

08:36 8 announcements from counsel, please.

08:36 9 MS. DE MORY: Good morning, Your Honor. Denise De Mory on

08:36 10 behalf of plaintiff Theta IP, LLC. With me are Aaron Hand,

08:36 11 Henry Bunsow.

08:36 12 MR. BUNSOW: Good morning, Your Honor.

08:36 13 THE COURT: Good morning.

08:36 14 MS. DE MORY: Russ Horton, Mike Flynn-O'Brien, Corey

08:36 15 Johanningmeier and Hillary Bunsow as well.

08:36 16 THE COURT: Welcome, all.

08:36 17 And for Samsung? Mr. Cordell?

08:36 18 MR. CORDELL: Good morning, Your Honor. Ruffin Cordell.

08:36 19 THE COURT: I think this is your first time in my

08:36 20 courtroom.

08:36 21 MR. CORDELL: It is, indeed, and it's beautiful. You

08:36 22 know, I don't know what took me so long.

08:36 23 THE COURT: Well, welcome here.

08:36 24 MR. CORDELL: Well, good. So I'm here on behalf of

08:36 25 Samsung this morning with Martin Black, Michael Song, Melissa

08:37 1 Smith, Michael McKeon, Dan Tishman.

08:37 2 We also have a -- one of our lawyers tested positive for
08:37 3 COVID and is sequestered in his hotel room. He feels fine, but
08:37 4 out of an abundance of caution, we're leaving him back.

08:37 5 THE COURT: Well, I had -- Christmas eve morning I tested
08:37 6 positive for COVID. So I spent my Christmas quarantined by
08:37 7 myself which was not the greatest Christmas ever. So I'm very
08:37 8 sympathetic to your partner.

08:37 9 MR. CORDELL: If the Grinch had only thought of that, that
08:37 10 would have been a better thing. Frank Albert might, with the
08:37 11 Court's permission, might appear for a couple of the arguments
08:37 12 remotely.

08:37 13 THE COURT: Absolutely fine.

08:37 14 MR. CORDELL: And then we have our client representative
08:37 15 here, Mr. Anthony Kahng, is with us from Samsung.

08:37 16 THE COURT: Welcome.

08:37 17 Are we ready to proceed?

08:37 18 MR. CORDELL: Yes, Your Honor.

08:37 19 MS. DE MORY: We are, Your Honor.

08:37 20 THE COURT: I think the first issue is -- let me just get
08:37 21 my cheat sheet. So the first issues have to do with claim
08:38 22 construction. And I'm happy -- there's a motion to adjourn
08:38 23 which I guess is moot or -- since we're taking this up today,
08:38 24 correct?

08:38 25 MR. CORDELL: We don't believe it's moot, but we are

08:38 1 taking it up today, hopefully.

08:38 2 THE COURT: Well, then I think it's going to be denied.

08:38 3 But let's go ahead and take up the motions.

08:38 4 MS. DE MORY: Your Honor, Mr. Johanningmeier will be
08:38 5 handling this.

08:38 6 THE COURT: Okay.

08:38 7 MR. CORDELL: And I believe it's our motion, Your Honor.

08:38 8 THE COURT: Yeah. I think they get to go first.

08:38 9 Good morning.

08:38 10 MR. BLACK: Good morning, Your Honor.

08:39 11 (Off-the-record discussion.)

08:39 12 MR. BLACK: There we go. Thank you, Your Honor.

08:39 13 So this is our motion. We started this off with a motion
08:39 14 for summary judgment of indefiniteness or noninfringement for
08:39 15 failure of their expert to use plain meaning.

08:39 16 The standard for indefiniteness, of course, is that a
08:39 17 claim must have reasonable certainty to it. And the issue in
08:39 18 this case is whether or not the claim is drafted, the high and
08:39 19 low relative terms of degree are sufficiently definite to allow
08:39 20 us to proceed and whether their expert used a plain and
08:39 21 ordinary meaning construction, which is what they asked for
08:39 22 during claim construction and Your Honor granted.

08:39 23 Now, the important point here is that it is not enough to
08:39 24 draw part of the boundary around a claim. It is not enough for
08:39 25 someone to be able to look at these claims and identify one

08:39 1 high condition where the device is at the highest possible
08:40 2 power level. You've got to be able to draw all the boundaries
08:40 3 around the fence, around the claim for it to be definite.

08:40 4 So if you have a situation like this where you've got
08:40 5 multiple possible ways to complete the fence, you do not have a
08:40 6 definite claim. That's the law.

08:40 7 The Supreme Court said in *Nautilus* in 2014, they tightened
08:40 8 up the standard, which means all the cases that came before
08:40 9 that and were cited in Theta's brief are largely irrelevant. A
08:40 10 patent claim has to be sufficient to inform those of skill in
08:40 11 the art about the scope of the invention with reasonable
08:40 12 certainty.

08:40 13 The Federal Circuit has said you must have objective
08:40 14 boundaries, and the Western District of Texas has said it
08:40 15 cannot fall inside the scope of the claim term but also it
08:40 16 falls outside of it. Both have to be known, got to have the
08:40 17 full scope of the claim.

08:40 18 The fact that the parties can do part of the work in this
08:40 19 case on infringement, part of the work on validity is
08:41 20 insufficient if the claim is not drawn completely.

08:41 21 So what are the claims that we have in this case? We've
08:41 22 got a method for power dissipation reduction in a receiver that
08:41 23 causes improvement in a drain on battery life. That's Claim 1
08:41 24 of the '962.

08:41 25 This is the basic functionality here, and this again is

08:41 1 from Claim 1 of the '962: Wherein the wireless transceiver
08:41 2 comprises a circuit for determining two things, a signal
08:41 3 strength of the interferer signal and a signal strength of the
08:41 4 desired signal.

08:41 5 So what we have on the left is you have the signal coming
08:41 6 in. You've got the desired in sort of green and the interferer
08:41 7 in red. They're mixed together. They go into the circuit.
08:41 8 There are sensors inside the phone that determine the signal
08:41 9 strength. And those spit out values, two numerical values, a
08:41 10 signal strength for the interferer and a signal strength for
08:41 11 desired signal.

08:41 12 Now, the question is: What do you do with those two
08:42 13 values?

08:42 14 Now, what the patent says is, you then have to determine
08:42 15 whether or not those values are high values or low values, and
08:42 16 there must be an algorithm for doing that. The device must
08:42 17 have a way to determine which are high and which are low. And
08:42 18 the experts applying infringement analyses in this case must be
08:42 19 able to state what that algorithm is, show that it's described
08:42 20 in the patent and that it creates reasonable certainty.

08:42 21 And those things are simply not present here. You have
08:42 22 two numbers that are spit out by the circuit. Are they high,
08:42 23 or are they low? That's the question.

08:42 24 Now, the patent teaches pretty straightforwardly with a
08:42 25 series of diagrams and text that the signal strength is graphed

08:42 1 on the Y-axis of this diagram here. Frequency on the right, on
08:42 2 the X-axis going to the right and signal strength going up.
08:42 3 These are values. The patent teaches at Column 5, Line 33 that
08:43 4 in each of these figures the signal strength is plotted along
08:43 5 the Y-axis 204 or 254 as a function of frequency along the
08:43 6 X-axis.

08:43 7 So, again, very straightforward, numerical values on the
08:43 8 Y-axis. If they're sufficiently high on the Y-axis, those are
08:43 9 high values. If they're near the bottom, near the origin,
08:43 10 those are low values. That's what the patent teaches. That's
08:43 11 plain meaning. You got numbers. Some are high and some are
08:43 12 low. That concept, easy enough.

08:43 13 The trouble is when you come to the point of trying to
08:43 14 determine which of those X and Y values are actually high or
08:43 15 low. There is no consensus, there is no standard for doing so,
08:43 16 there is nothing in the patent which teaches you which ones are
08:43 17 high and which ones are low.

08:43 18 Now, there's no debate that the highest and the lowest
08:43 19 satisfy the high and the low. But as soon as you come away
08:43 20 from the top, as soon as you start moving up from the bottom,
08:43 21 there's ambiguity in the claim.

08:44 22 Now, we pointed this out at claim construction and Theta
08:44 23 made a promise. They promised that they were going to bring
08:44 24 standards, that they were going to bring certainty during the
08:44 25 course of the case to this question. They referred to the LTE

08:44 1 standard. They referred to other standards and said that they
08:44 2 would bring that evidence to the Court in their expert reports,
08:44 3 and they didn't do that.

08:44 4 Now, during the briefing -- and this is Theta's Markman
08:44 5 brief, they agreed, and this is the law when a word of degree
08:44 6 is used -- and high and low are words of degree -- the Court
08:44 7 must determine whether the patent provides some standard for
08:44 8 measuring it. That was the debate at Markman. It wasn't about
08:44 9 whether engineers understand high or low. It wasn't about
08:44 10 whether someone in a course might write up on a board, well, if
08:44 11 it's high, do this, if it's low, do that.

08:44 12 The question is, what is the objective standard? What is
08:44 13 the algorithm that an expert can use to determine which of
08:44 14 those values, X and Y values, are high and which are low.
08:45 15 There must be an objective standard.

08:45 16 Now, they told you at Markman that they were going to
08:45 17 provide that information to us and to the Court. These are
08:45 18 quotes from their Markman briefing. They said, "A POSITA would
08:45 19 readily understand that reference to the relevant specification
08:45 20 or standard would be expected." They said, "Wireless standards
08:45 21 and specifications typically set forth required minimum
08:45 22 operating conditions in the context of the standards and/or
08:45 23 requirements documents applicable to a particular embodiment."

08:45 24 They said that a POSITA would interpret the claims with
08:45 25 reference to applicable wireless standards and specifications.

08:45 1 What they told the Court is, they were going to bring in
08:45 2 standards like the LTE standard which would inform the Court
08:45 3 and provide the reasonable certainty about which values were
08:45 4 high and which values were low.

08:45 5 Now, we said at the time that that was the wrong way to
08:45 6 approach it because the standard that's published after the
08:45 7 patent is filed does not become part of the specification and
08:45 8 cannot be used to inform reasonable certainty, but you ruled
08:46 9 against us. We accept that.

08:46 10 However, they broke their promise. They did not bring in
08:46 11 their expert reports the standards or anything objective from
08:46 12 which you could tell which of those X and Y values are high and
08:46 13 which are low.

08:46 14 Instead, when their experts arrived for their
08:46 15 deposition -- and I want to point out, there's no section on
08:46 16 claim construction in their report. We waited for their expert
08:46 17 report because in their initial infringement contentions, the
08:46 18 amended contentions, the amended contentions, which changed
08:46 19 their case entirely, they took no position on how one is to
08:46 20 determine whether X and Y are high or low.

08:46 21 We waited for the expert report. We opened the report.
08:46 22 444 pages failed to identify any standard for determining high
08:46 23 and low. They did that intentionally.

08:46 24 Now, the first step in an infringement analysis, we always
08:46 25 say -- and it's the law and you'll give an instruction on that

08:47 1 to the jury -- is, you must first construe the claims, then you
08:47 2 apply the accused product against the language.

08:47 3 But here we didn't get a construction from them. They
08:47 4 just said plain meaning, and that's it. They didn't tell us
08:47 5 how you calculate X and Y and how you determine whether they're
08:47 6 high or low.

08:47 7 So we finally had an opportunity to get the answer from
08:47 8 their expert, Dr. Larson, when we took his deposition. And he
08:47 9 said a couple of really interesting things. He said: There's
08:47 10 no unambiguous boundary between high and low, and, therefore,
08:47 11 in my opinion, between high and low. Except that clearly, an
08:47 12 order of magnitude, that's high. And equal is not high.

08:47 13 Well, let's break that apart.

08:47 14 No unambiguous boundary. The boundary is required to make
08:47 15 a claim definite. It's not enough that you can point to an
08:47 16 example that might be high. Those who are in the field, those
08:47 17 who are in the area have a right to know.

08:47 18 The public notice function of the patent requires that we
08:47 19 be able to determine with certainty every single limitation,
08:48 20 every single embodiment that is within the claim and without
08:48 21 the claim. That's the law. That's Nautilus. That's the
08:48 22 Supreme Court.

08:48 23 He struggled, and then he said, well, you know what, if
08:48 24 I'm pressed, how about an order of magnitude? Meaning that the
08:48 25 claims are -- for high and low would be sufficient if the high

08:48 1 is 10 dB, an order of magnitude above the low. That creates
08:48 2 absurd results. It's not in the patent and it is definitely
08:48 3 not plain meaning, which was your construction.

08:48 4 So if that is the construction that he applied, and that's
08:48 5 the only evidence we have, he did not apply the Court's
08:48 6 construction and they therefore cannot present that
08:48 7 infringement opinion. Does not comply with the Court's
08:48 8 construction.

08:48 9 He also said that there's a transition from high to low to
08:48 10 equal, where the transition is unclear. And then he said
08:48 11 people could genuinely honestly disagree about that. That is
08:48 12 the definition of indefiniteness. An expert can't come in and
08:49 13 say I don't know what the scope of the claim is and then apply
08:49 14 that claim and ask for [REDACTED]. That is not the way the
08:49 15 process works.

08:49 16 This was not an accident. This was a plan on the part of
08:49 17 Theta. Dr. Larson repeated it again later in his deposition.
08:49 18 He says, "As I've said, you know, this order of magnitude
08:49 19 thing, it's approximate." Order of magnitude.

08:49 20 You didn't hear about that in the most recent briefing at
08:49 21 all. They've come up with new constructions. But he applied
08:49 22 the order of magnitude construction.

08:49 23 When we got to their invalidity expert, he used the same
08:49 24 construction. This was a setup. They come to the depositions
08:49 25 and they provide a construction that wasn't given to us and

08:49 1 wasn't plain meaning. And he says, "I would say that a low
08:49 2 signal would be 10 dB or less smaller than the interferer in
08:49 3 this case. But, you know, that's an arbitrary number." An
08:49 4 arbitrary number.

08:49 5 Eventually we're going to go to Washington and the Federal
08:49 6 Circuit's going to hear an appeal in this case. Arbitrary
08:50 7 number. These claims are indefinite, and they are indefinite
08:50 8 because Theta is struggling to come up with an infringement
08:50 9 case that makes sense. They can't build one.

08:50 10 But more fundamentally, they got a plain meaning
08:50 11 construction. We all accepted that as the law of the case.
08:50 12 They didn't use plain meaning when they prepared their expert
08:50 13 reports. This is the wrong construction and it's not plain
08:50 14 meaning, and it means they have no infringement case to put on.

08:50 15 Look at what that construction would do to the case. You
08:50 16 have a -20 dBm signal is high and then a -30 dBm signal is low
08:50 17 because it's 10 dBm apart, one order of magnitude. You've got
08:50 18 two signal strengths in the middle with -60 and -70. Those are
08:50 19 medium. They're neither high nor low.

08:50 20 And then you've got a low signal of -110 dBm. You got a
08:50 21 high signal of -100. The receiver can barely interpret that.

08:50 22 That's the construction they picked. That's the
08:51 23 construction that they built their expert report around and
08:51 24 they built the case around, and that's the construction they
08:51 25 want to go to the jury with. But it is not a valid

08:51 1 construction. It is not supported by the specification,
08:51 2 extrinsic evidence. And more importantly, it's not what they
08:51 3 asked for and not what your Court granted which was a plain
08:51 4 meaning construction.

08:51 5 This case, as a result of all this, is a mess. You've got
08:51 6 a situation where you had a plain meaning construction and they
08:51 7 took advantage of that. They built ambiguity into their expert
08:51 8 reports. We've nailed them down to a construction at the
08:51 9 depositions, and now we're somewhere else.

08:51 10 Now, we argued this two weeks ago, and Your Honor asked
08:51 11 for a very straightforward and reasonable thing: A short brief
08:51 12 from Theta on how its expert applied plain meaning and what its
08:52 13 infringement theory was.

08:52 14 We got a 25-page brief in response which started with a
08:52 15 jury argument about why their inventor's such a great guy, how
08:52 16 he's been pictured on IEEE Magazine, Columbia professor,
08:52 17 eminent professor. All that's true. He's an impressive guy.
08:52 18 But it has nothing to do with whether the claims in this case
08:52 19 are definite and what they actually got out of the Patent
08:52 20 Office.

08:52 21 What they did not address is the order of magnitude
08:52 22 construction that their expert used. They then proposed on
08:52 23 Pages 6 to 7 of their brief, two days before -- three days
08:52 24 before Christmas, a set of new constructions which make no
08:52 25 sense whatsoever.

08:52 1 When we pointed that out -- and Your Honor had ordered new
08:52 2 claim construction. You ordered them to tell them what claim
08:52 3 construction to actually apply, which they didn't do. When we
08:52 4 pointed out that their constructions were not only wrong but
08:52 5 inconsistent with what their expert had done and there was no
08:52 6 support for, they then, on Sunday of this week, removed the
08:53 7 noise floor and the S_{MAX} , rewrote the constructions again.

08:53 8 Now, we can't keep up with this dizzying array of
08:53 9 construction after construction after construction. We've had
08:53 10 at least four constructions in this case, though, from Theta.

08:53 11 First, what they promised at Markman, we'll show you the
08:53 12 standards that'll resolve any ambiguity. Didn't happen.

08:53 13 Second, compare the desired and the interferer signal to
08:53 14 each other, where the higher one is roughly 10 dB order of
08:53 15 magnitude stronger. Well, they've abandoned that too. That
08:53 16 was the one they used in their expert reports.

08:53 17 Now, on December 22nd, they say compare the signals to
08:53 18 each other and to the noise floor and the S_{MAX} in some weird
08:53 19 undefined way. We got a brief a couple days later and they
08:53 20 retracted that.

08:53 21 And now, on January 2nd, a few days before trial, two days
08:53 22 ago, on Sunday, they tell us that we should just compare the
08:53 23 signals to each other to see if they're near each other,
08:53 24 creating ambiguity upon ambiguity upon ambiguity.

08:54 25 What does this show?

08:54 1 This shows that Theta does not know what their claims
08:54 2 mean. This shows that these claims are indefinite. This is,
08:54 3 in fact, the strongest evidence of indefiniteness in the case,
08:54 4 that even the plaintiff cannot decide what its own claims mean
08:54 5 from day to day.

08:54 6 The latest set of constructions, meaningless, indefinite.
08:54 7 We haven't had an opportunity to respond to them. Their brief
08:54 8 is chock-full of extrinsic evidence, which we haven't had an
08:54 9 opportunity to examine.

08:54 10 It's not in comport with the intrinsic evidence. It's not
08:54 11 in comport with the specification or the file history here,
08:54 12 which did not grant Dr. Tsividis what he would've liked to
08:54 13 have, the patent on dynamic signal changing. He did not get
08:54 14 that. He had something much narrower.

08:54 15 So here's what they say now -- and I point out and it's
08:54 16 highly prejudicial that we have to do this Tuesday, two days
08:55 17 after getting the constructions, when this is a
08:55 18 case-dispositive issue.

08:55 19 What they say for the low-low, for instance, case is that
08:55 20 the signal -- desired signal is low, combined with the signal
08:55 21 strength of the interferer signal that is near the desired
08:55 22 signal.

08:55 23 So we first have to determine whether desired signal is
08:55 24 low. That's a question begging if there ever was one. The
08:55 25 "signal strength of the desired signal low" is the claim term,

08:55 1 and their definition is "a signal strength of the desired
08:55 2 signal that is low."

08:55 3 What kind of construction is that? That's
08:55 4 nonconstruction. That's going backwards.

08:55 5 And then for the interferer, now they've got a new
08:55 6 construction. It's just "near the desired signal strength."

08:55 7 There's no objective standard. There's no reasonable
08:55 8 certainty here. We're going backwards, not forwards.

08:55 9 What does "near" mean? We have no idea. Does it mean an
08:55 10 order of magnitude, 10 dB? I don't know. How can we tell from
08:56 11 this? And how can you enter these constructions when, most
08:56 12 importantly, these are not the constructions that were used by
08:56 13 their expert during the expert phase of this case? That's the
08:56 14 critical point, Your Honor.

08:56 15 They did not answer your question about what constructions
08:56 16 their expert actually used. Instead, they proposed new
08:56 17 constructions twice in the last two weeks. But the one thing
08:56 18 that we know must be true is that because these words are
08:56 19 different, because these are new constructions, these are not
08:56 20 the constructions that their expert used.

08:56 21 And what that means is they would like to go to trial and
08:56 22 put on an infringement case based on expert opinion that is not
08:56 23 based on a construction that their expert used or provided to
08:56 24 us. That cannot possibly be done, that cannot possibly be
08:56 25 fair.

08:56 1 And that's our principal reason, Your Honor, for asking
08:56 2 for either indefiniteness here or that a finding of no plain
08:56 3 meaning was used, and that the case should be dismissed on
08:57 4 summary judgment.

08:57 5 If we're going to have some sort of claim construction
08:57 6 procedure, we've got to have it fairly, we've got to have an
08:57 7 opportunity to respond to it and we've got to have an
08:57 8 opportunity to put the case back into position for trial. It
08:57 9 cannot be tried next week on these constructions.

08:57 10 Thank you.

08:57 11 THE COURT: I'll hear a response.

08:57 12 MR. JOHANNINGMEIER: Your Honor, we have paper copies of
08:57 13 our slides. Would you like some for you and the clerks?

08:57 14 THE COURT: I can see it on the screen here. I don't
08:57 15 need --

08:57 16 MR. JOHANNINGMEIER: Okay. All right.

08:57 17 Well, good morning, Your Honor. So I'm going to start
08:57 18 here with what Your Honor asked us to do, which is a
08:58 19 supplemental brief on claim construction.

08:58 20 So if we can have the next slide.

08:58 21 Okay. So a year ago there was a Markman hearing. I
08:58 22 wasn't here, actually, because my daughter was born a few
08:58 23 months before. So I didn't get a chance to argue at that
08:58 24 hearing. Mr. Hand did an excellent job.

08:58 25 And at that hearing, at the end of the hearing, Mr. Black

08:58 1 argued about the middle boundary between high and low. And
08:58 2 Your Honor decided that the claims were definite and that plain
08:58 3 meaning would apply. So that was the law of the case. That's
08:59 4 what we had and that's what we did.

08:59 5 The claim terms do have a plain meaning to a person of
08:59 6 ordinary skill. Professor Larson applied that meaning. His
08:59 7 understanding is consistent with everyone else on our side of
08:59 8 the case, and it's consistent with their expert when he's
08:59 9 talking about invalidity.

08:59 10 And the Court has already decided that these terms are
08:59 11 definite. But we're here on a rehearing of that and multiple
08:59 12 briefs from them about indefiniteness. They haven't engaged on
08:59 13 the construction issue.

08:59 14 But let's just talk about the plain meaning, because
08:59 15 that's what we understood Your Honor to be asking about in the
08:59 16 last hearing.

08:59 17 So in the next slide, a person of ordinary skill would
08:59 18 understand the claims. Now, this is Dr. Kiaei, Samsung's
08:59 19 expert. He did both infringement and invalidity. And he cited
08:59 20 a textbook in his background of his invalidity section, and
08:59 21 that textbook's from 1998, so before these patents. And in
09:00 22 there we find a description of the very situation that's in
09:00 23 Dr. Tsividis' patents. Just the -- you know -- and it's
09:00 24 exactly the same way.

09:00 25 So the point here is that Dr. Tsividis, Professor

09:00 1 Tsividis, teaches this material in the way that's shown on the
09:00 2 right in the patent. He shows the signals, the signal levels,
09:00 3 relative to the noise 4N, relative to the signal maximum.

09:00 4 Dr. Razavi, in this other textbook, teaches it the same
09:00 5 way, high interferes -- "a weak signal accompanied by two
09:00 6 strong interferers" that then you would experience third-order
09:00 7 non-linearity, could corrupt the desired component.

09:00 8 So the point here is that this is how the stuff is taught
09:00 9 in the industry. This is how it is explained.

09:00 10 On the next slide, another reference that's in Dr. Kiaei's
09:00 11 report showing the same way, talking about it in the same way,
09:00 12 strong desired signals, weak desired signals and interferers, a
09:01 13 diagram that looks very familiar.

09:01 14 Again, this is how things are talked about and shown in
09:01 15 this industry by persons of ordinary skill. This is how
09:01 16 they're taught in the textbooks and in the papers that they
09:01 17 read.

09:01 18 [REDACTED]
09:01 19 [REDACTED]
09:01 20 [REDACTED]

09:01 21 That figure would look familiar; but if it doesn't, there
09:01 22 it is on the right from the patent.

09:01 23 And on the bottom, here's a paper he published in 2003 in
09:01 24 an IEEE publication talking about the desired signal being
09:01 25 strong and no strong blocker being present, talking about a low

09:01 1 noise floor.

09:01 2 This is how people talk about this stuff in the industry.

09:01 3 This is how a person of ordinary skill understands this kind of

09:01 4 material. They understand what high signals mean in their

09:01 5 particular application. They understand what low signals mean

09:02 6 in their particular application, depending on what standard

09:02 7 they're using. Whether it's LTE, whether it's 802.11 WiFi,

09:02 8 this patent applies to all of those.

09:02 9 Each of those has different standards. Each of those

09:02 10 standards has different signal maximums that are specified. So

09:02 11 if you know you're doing LTE, you know there's a rough sense

09:02 12 that gives you the low number, you know what's high, and you

09:02 13 can figure all of this out. That's what we've been saying all

09:02 14 along.

09:02 15 On the next slide, you know, this is just a reminder from

09:02 16 the tutorial. This is how we were talking about it back then.

09:02 17 There's a lot of talk in their briefs about us changing our

09:02 18 position. We have not done that. This has been the consistent

09:02 19 position all along.

09:02 20 You start from a condition where you have a signal maximum

09:02 21 and a noise floor, and this is what's described on the right.

09:02 22 On the left here is what's described in the patents as the

09:02 23 worst case -- or a worst case, the worst case with the high

09:03 24 interferers and the low signal strength.

09:03 25 It teaches that when you're in that situation, you can

09:03 1 adjust the bias and lower the signal maximum. When you lower
09:03 2 the signal maximum, you've changed the operating point of the
09:03 3 circuit. So now it has a new high and a new low. It has a
09:03 4 different dynamic range. So then from that point forward,
09:03 5 you're now operating with a different low and a different high.

09:03 6 We use the example in our brief of someone climbing a
09:03 7 mountain. You know, they can start from the bottom and they're
09:03 8 going to get all the way to the top, but part way up they're
09:03 9 going to set an anchor, and then they're going to climb some
09:03 10 more from there.

09:03 11 The worst case for them is when they are way above their
09:03 12 anchor point, then they set a new anchor and now they have a
09:03 13 new floor and they're going to climb up towards the new
09:03 14 ceiling.

09:03 15 It's the same -- this is basically how you understand the
09:03 16 chart that Mr. Black showed. He showed the entire range and
09:04 17 suggested that low could only be down at the bottom, high could
09:04 18 only be at the top.

09:04 19 Within that range, there's an operating range that has a
09:04 20 floor and a ceiling. That's what defines what's high and low,
09:04 21 and it changes over time in the course of operating as
09:04 22 described in the patents.

09:04 23 On the next slide is the same thing. The impedance
09:04 24 changing, which raises the floor. It's showing a new range.
09:04 25 In the right here, it shows the power dissipation, but that's

09:04 1 the dynamic range of the circuit.

09:04 2 So this is how the patent teaches this stuff to a person
09:04 3 of ordinary skill, and that's how they understand it.

09:04 4 And it is objective. Objective doesn't have to mean
09:04 5 numbers are applied. Objective means you can figure it out. A
09:04 6 person of ordinary skill can figure it out.

09:04 7 On the next slide, it's taught the same way in the patent.

09:05 8 He talks about a worst-case input signal where you've got the
09:05 9 low -- this will be 2B on the right -- the low desired signal,
09:05 10 the high interferers, and talks about the circuit impedances
09:05 11 and currents that are being set such that the noise floor is
09:05 12 sufficiently low for acceptable bit-error rate. So if you get
09:05 13 too low, you get errors and it doesn't work. That's how you
09:05 14 know you're too low.

09:05 15 And then you set it for -- the bias currents are set
09:05 16 sufficiently high for a required signal maximum. So you have
09:05 17 to have your maximum above the strongest signal you're going to
09:05 18 receive so that you don't get clipping and interference.

09:05 19 This is all taught in the patent. Person of ordinary
09:05 20 skill understands this. They know that their circuit has a
09:05 21 floor and it has a ceiling, and they know that that ceiling and
09:05 22 floor move when they change the parameters.

09:05 23 Okay. Next slide.

09:05 24 Just more diagrams showing the same thing. Reducing
09:05 25 the -- sorry. Yeah. You can go on to Slide 11.

09:06 1 So there is, you know, many, many teachings in the patent
09:06 2 of how this works. [REDACTED]

09:06 3 [REDACTED]
09:06 4 [REDACTED] It's consistent with
09:06 5 textbooks and references that their own invalidity expert
09:06 6 relied on.

09:06 7 So -- and here it's showing that the worst-case signal
09:06 8 condition with reference to the figures is where the desired
09:06 9 signal is lower than the interferers. That's the worst case
09:06 10 because the interferers when you -- if you have a low desired
09:06 11 signal and you're attempting to amplify it in order to be able
09:06 12 to receive it, you're also amplifying the interferers. So this
09:06 13 causes problems. It requires a very wide, dynamic range. It's
09:06 14 hard to do in the circuit. So he's teaching that to a person
09:06 15 of ordinary skill.

09:06 16 Now, on the next slide, here's where we applied this.

09:07 17 Dr. Larson in his report applied this to the actual devices,
09:07 18 the actual chips and the phones, you know. The -- here he's
09:07 19 using the datasheet for one of the transceivers in the phone.

09:07 20 MR. BLACK: Your Honor, I'm sorry to interrupt. This is
09:07 21 highly confidential material, which some people in the
09:07 22 courtroom may not be entitled to see. I just want to make sure
09:07 23 we don't have anyone.

09:07 24 THE COURT: You know what? You can -- I understand
09:07 25 your -- the point you're making. You can take it off the

09:07 1 screen.

09:07 2 MR. JOHANNINGMEIER: Okay.

09:07 3 THE COURT: And Mr. Black?

09:07 4 MR. JOHANNINGMEIER: That's a good reason. I'll give you
09:07 5 the paper copies.

09:07 6 THE COURT: Mr. Black, are you okay with him discussing
09:07 7 this in -- on the open record if he doesn't use that?

09:07 8 MR. BLACK: Yes, Your Honor. As long as we have an
09:07 9 opportunity later to redact anything of the public record, I
09:07 10 think that should be fine for this.

09:07 11 MR. JOHANNINGMEIER: Okay.

09:08 12 THE COURT: If you'll just get me to the page that you're
09:08 13 on.

09:08 14 MR. JOHANNINGMEIER: Yes. So Page 12, and I'll try to
09:08 15 remember to call out the page numbers.

09:08 16 THE COURT: Is it 13? It looks like 13.

09:08 17 MR. JOHANNINGMEIER: Well, there's two. So the -- Page

09:08 18 12. [REDACTED]

09:08 19 [REDACTED]

09:08 20 [REDACTED]

09:08 21 [REDACTED] It's discussed in the textbook
09:08 22 that we mentioned. It's in our brief, you can see the
09:08 23 discussion in the Razavi textbook that their expert relies on.

09:08 24 [REDACTED]

09:09 1 [REDACTED]

09:09 2 [REDACTED]

09:09 3 [REDACTED]

09:09 4 [REDACTED]

09:09 5 [REDACTED]

09:09 6 So Dr. Larson says in his report this here, at least,

09:09 7 meets the worst-case conditions. You've got a low desired

09:09 8 signal. You've got a jammer signal that's 1,000 times larger

09:09 9 than that. And so that would be a worst-case condition.

09:09 10 [REDACTED]

09:09 11 [REDACTED]

09:09 12 [REDACTED]

09:10 13 [REDACTED]

09:10 14 [REDACTED]

09:10 15 [REDACTED]

09:10 16 [REDACTED]

09:10 17 [REDACTED]

09:10 18 [REDACTED] So he makes that point to start in his analysis.

09:10 19 The next thing he does relative to these particular terms

09:10 20 is on Page 14 there are gain -- there are diagrams showing the

09:10 21 various gain states and showing the map of the signal

09:10 22 conditions. [REDACTED]

09:10 23 [REDACTED]

09:10 24 [REDACTED]

09:10 25 [REDACTED]

09:10 1 [REDACTED]

09:11 2 [REDACTED]

09:11 3 [REDACTED] And, you know, of

09:11 4 course, in his report he describes all of the code and the

09:11 5 documents behind this, why this is working this way.

09:11 6 And there's no disagreement from them with how this works.

09:11 7 So there's not -- we're not going to have a dispute about how

09:11 8 the actual products are working here, right?

09:11 9 And then on the right it shows the noise figures, which

09:11 10 add up to basically the total noise floor, changing. It shows

09:11 11 the signal-to-noise ratio changing. So the signal-to-noise

09:11 12 ratio is the signal to the noise floor that's changing along

09:11 13 with the gain state.

09:11 14 So this is showing basically in action with real numbers,

09:11 15 for this particular transceiver how the thing is stepping

09:11 16 through those different signal figures like we showed in the

09:12 17 patent, with the noise floor and the signal maximum changing as

09:12 18 the gain states change, which is done based on the input

09:12 19 signals.

09:12 20 [REDACTED]

09:12 21 [REDACTED]

09:12 22 [REDACTED]

09:12 23 [REDACTED]

09:12 24 [REDACTED] This is -- that aspect

09:12 25 of it is not disputed here.

09:12 1 So this is how he applied -- you know, obviously there's
09:12 2 more to his report about the other claim steps, but this is how
09:12 3 he applied the plain meaning as taught in the teachings of the
09:12 4 patent. You know, there's -- what does plain meaning mean? It
09:12 5 means: What would people understand when they read the patent?

09:12 6 That's the definition from Phillips, right, that plain
09:12 7 meaning is what a person of ordinary skill understands from
09:12 8 reading the patent. They would read this, they would
09:13 9 understand how it works, and then they would try to apply that
09:13 10 to these chips. They would look at the testing numbers and
09:13 11 they can -- you know, if you want objective numbers, here they
09:13 12 are.

09:13 13 But this is showing how this works. The algorithm is in
09:13 14 the code that he looked at. Counsel mentioned an algorithm. I
09:13 15 heard a few times that the code is performing this algorithm to
09:13 16 make these adjustments in this particular environment. I
09:13 17 believe this is LTE signals, but, you know, the -- because
09:13 18 that's one of the things that these devices cover.

09:13 19 So Your Honor asked us to show you this, so we put this in
09:13 20 our brief and here it is in the slides.

09:13 21 Your Honor also suggested that, you know, there may be a
09:13 22 need to do construction. And part of the goal of the
09:13 23 supplemental briefing was to do that now rather than during the
09:13 24 trial, which is a laudable goal, if it's necessary. So we
09:14 25 proposed constructions.

09:14 1 Now, we clarified, we don't think this requires
09:14 2 construction. What's actually happened in this case is we've
09:14 3 construed plain and ordinary meaning. [REDACTED]

09:14 4 [REDACTED]
09:14 5 [REDACTED]
09:14 6 [REDACTED]
09:14 7 [REDACTED]

09:14 8 And that's true, there are. In other gain states at the
09:14 9 very end of the range, you can have one that's only up at -12.
09:14 10 But within the subset of the range that you're operating in,
09:14 11 which is between the noise floor and the maximum, this is a
09:14 12 worst-case condition.

09:14 13 So he wants to go to the end points and say, you know, the
09:14 14 lowest possible signal and the highest possible signal; and if
09:14 15 you're less than the highest possible, that's not infringing.
09:14 16 He's got that in his report at Paragraph 309. That's just a
09:15 17 claim interpretation. That's a misapplication of plain and
09:15 18 ordinary meaning.

09:15 19 They don't want to look at that. They didn't address
09:15 20 that, when we brought it up in our brief, in their response.
09:15 21 Their expert is misapplying this stuff. That's the issue.

09:15 22 And then they're just doggedly saying indefinite,
09:15 23 indefinite, indefinite. They don't want to talk about what
09:15 24 their expert did on either invalidity, where he understood the
09:15 25 claims the same way, or on infringement, where he's basically

09:15 1 making claim reinterpretations.

09:15 2 So that's the situation we're in. We proposed
09:15 3 constructions because we wanted to offer something that would
09:15 4 be consistent with our -- what we've done in our report, if
09:15 5 Your Honor feels it's necessary to construe these claims in
09:15 6 order to give clarity to the jury; because that's ultimately
09:15 7 what we're trying to do here, is not confuse the jury about how
09:15 8 this works. That's the purpose of claim construction.

09:15 9 So we made a proposal and initially suggested that we
09:15 10 could put in the noise floor and the signal maximum. They
09:16 11 complained about that, said they didn't like it. So we pointed
09:16 12 out, you could do it without those as well.

09:16 13 Either of those proposals is consistent with what
09:16 14 Dr. Larson did. Of course, we wouldn't have proposed it if it
09:16 15 were otherwise, right? I mean, these are constructions that,
09:16 16 again, we're offering in order to clarify things for the jury.

09:16 17 Mr. Black suggested he didn't have any the opportunity to
09:16 18 respond. They've had plenty of briefing on this. They had a
09:16 19 responsive brief. They didn't choose to address it rather than
09:16 20 just continue to go back to where they were at the beginning on
09:16 21 Slide 16.

09:16 22 This is from last year. There's no standard here, Your
09:16 23 Honor, for low end of high or the high end of low. That's
09:16 24 where they were at the end of the Markman argument, and then
09:16 25 you told them that everyone agreed that a person of skill in

09:16 1 the art would understand what this means, doesn't need to be
09:16 2 construed, and it will have plain and ordinary meaning.

09:16 3 So that's what we did. That's what Dr. Larson did. He
09:17 4 applied that, found infringement, which they don't dispute the
09:17 5 facts of. They came back with some interpretive
09:17 6 noninfringement arguments that we don't think are appropriate.
09:17 7 And they also filed a -- you know, they spent most of discovery
09:17 8 quizzing all of our deponents on what would happen if you were
09:17 9 in the middle between high and low, right?

09:17 10 There's hours of testimony of various forms of questioning
09:17 11 about the middle boundary between high and low. And in some of
09:17 12 that testimony Dr. Larson, being a helpful person, said, well,
09:17 13 you know, if he was looking at that, maybe 10 dBm, an order of
09:17 14 magnitude would be sufficient to say, okay, there's enough of a
09:17 15 difference to matter here.

09:17 16 This isn't a construction that he applied in his report.
09:17 17 They say it's not in his report. Of course it's not in his
09:17 18 report. This is his response to being deposed on this middle
09:18 19 boundary. And he suggested that. But so did Dr. Smith, our
09:18 20 other expert. And even -- there's even some testimony from
09:18 21 Professor Tsividis about a 10 dB difference that we've got in
09:18 22 our briefs.

09:18 23 This is not a construction. This is not an order of -- he
09:18 24 called it an order of magnitude construction. That's not the
09:18 25 construction here. It was never applied that way. It is a

09:18 1 response to a deposition question about what would a person of
09:18 2 ordinary skill do in this middle boundary?

09:18 3 And Dr. Larson clearly said, well, they would look at at
09:18 4 least 10 dB. An order of magnitude would be a significant
09:18 5 thing, and that he's basing that on his experience in the
09:18 6 industry as a inventor and as a teacher. He's been teaching
09:18 7 this for many, many years. Not as many as Dr. Tsividis, but
09:18 8 he, you know, offered that as an example.

09:18 9 But it's not a construction. It's not what we're going
09:19 10 with. It's not a, you know, new thing that we tried to
09:19 11 surprise them with. It's a response to questioning on the
09:19 12 issue that Your Honor decided last year. And so you know,
09:19 13 that's the reason it's not in the reports. It is what a person
09:19 14 of ordinary skill would understand according to Dr. Larson and
09:19 15 Dr. Smith and Dr. Tsividis.

09:19 16 And, you know, these numbers that I showed here on Slide
09:19 17 12 meet that. They're three orders of magnitude apart. So it
09:19 18 meets its construction. It's consistent with his analysis to
09:19 19 say that that's a minimum point. But it isn't a construction
09:19 20 or a rule that we're applying. It is not the construction, it
09:19 21 is not necessarily even the plain meaning.

09:19 22 But, you know, if asked, how would you tell? Dr. Larson
09:19 23 would say, well, I would find at least 10 dB to be something
09:19 24 that was significant, that or more.

09:20 25 But as we pointed out in our briefs, there's no claim

09:20 1 element that goes to this middle boundary. There is no, you
09:20 2 know, medium-medium that -- you know, there are other claims in
09:20 3 other parts of the patent family that talk about medium. But
09:20 4 there is no -- these claims do not talk about medium signal
09:20 5 strength. They talk about unambiguously high, which Dr. Larson
09:20 6 said there are, you know, discernable and unambiguously low.
09:20 7 And when you get in that situation, they tell you what to do to
09:20 8 change your floor, to change your ceiling, to get into a new
09:20 9 operating point where you can save power.

09:20 10 And then once you're in that new operating point with that
09:20 11 new floor and that new ceiling, you can find a worst-case
09:20 12 condition again and do the same adjustment again. It's
09:20 13 dynamic, biasing. It's changing the operating conditions of
09:20 14 the circuit in order to save power over time. And that's
09:20 15 what's taught in the patents.

09:20 16 Now, I have a number of slides here about all of our
09:21 17 witnesses talking about the -- you know, consistently with
09:21 18 this. These slides were, I think, handed up in the last
09:21 19 hearing as well. And I'm happy to go through them if Your
09:21 20 Honor wants, but I think the point here is that the main thing
09:21 21 to take away from this is their own invalidity expert
09:21 22 understands this patent in the same way that we do and cites to
09:21 23 materials that talk about low and high and weak and strong
09:21 24 signals that show the same diagrams that Dr. Tsividis is using
09:21 25 to teach this stuff.

09:21 1 Their own expert gets it when he wants to do invalidity.
09:21 2 Their own expert doesn't apply any objective standard to find
09:21 3 numbers for high and low in his invalidity report. He just
09:21 4 applies the claims the same way here.

09:21 5 So there's no surprise for them. There's no -- you know,
09:21 6 they've understood this all along. They just want a ruling
09:22 7 that because there's not numbers in this patent, that it is
09:22 8 somehow indefinite. But that isn't the law.

09:22 9 I will put that up just briefly. Hold on one second.

09:22 10 The other thing about their expert report is that he
09:22 11 didn't talk about indefiniteness. He didn't, you know, suggest
09:22 12 that these claims were unresolvable, especially when he was
09:22 13 trying to find them invalid. But he doesn't say that. He
09:22 14 doesn't have an indefiniteness opinion. He says the claims are
09:22 15 invalid. He says they're not infringed because he interprets
09:22 16 high and low differently.

09:22 17 So in the *Nautilus* case, the standard is reasonable
09:23 18 certainty to a person of ordinary skill. And *Nautilus* cited
09:23 19 another older case called *Eibel* about the paper-printing
09:23 20 machines that had the term "high" in it. And the Supreme Court
09:23 21 said, well, people of skill in this art know these machines and
09:23 22 they would know what high is.

09:23 23 And that's the same -- here it is on this slide. Thank
09:23 24 you, Aaron.

09:23 25 Slide 34. All the way back in 1923, the Supreme Court

09:23 1 said this. Now, Nautilus didn't overturn this. Nautilus cited
09:23 2 this. So here's an example of the Supreme Court saying that
09:23 3 when the evidence discloses that a person of skill has no
09:23 4 difficulty in fixing the place that's high, then it's fine.

09:23 5 And of course there's also, on the following slides, a
09:23 6 bunch of district court cases.

09:23 7 Next one, then. 36, I guess.

09:23 8 Eibel. Input/Output in the Eastern District, "low
09:23 9 frequency forces."

09:24 10 Now, some of these results are because there was examples
09:24 11 in the spec, and some of these results are because a person of
09:24 12 ordinary skill would understand this.

09:24 13 There's multiple ways to meet the objective standard, not
09:24 14 just numbers, not just a formula. What we have in this patent
09:24 15 is a description of how to dynamically change things so that
09:24 16 they will save power over time. So the Freeny case is one in
09:24 17 the Eastern District. The Corning Optical case, low-frequency
09:24 18 control signals. Freeny was low-power communication signals.
09:24 19 I believe Your Honor might have been in that case, so you might
09:24 20 actually remember that one.

09:24 21 The low profile, you know, again, there's plenty of
09:24 22 examples. It's a case-by-case thing of course, so there's
09:24 23 examples going the other way. But if the -- I think the core
09:24 24 thing to look at here is what was done in the Eibel case and
09:25 25 how that wasn't changed by Nautilus. If a person of ordinary

09:25 1 skill can figure this out and apply it objectively, then it's
09:25 2 not indefinite.

09:25 3 So I won't -- I will save some time in case there's some
09:25 4 rebuttal. Or if Your Honor has any questions, I'm happy to...

09:25 5 THE COURT: Okay. I'll hear from Mr. Black.

09:25 6 MR. JOHANNINGMEIER: Okay.

09:25 7 MR. BLACK: Thank you, Your Honor.

09:25 8 So we are a couple days before trial. We have had two
09:25 9 rounds of argument, 37 pages of briefing from Theta after you
09:25 10 requested a short brief on the topic and something like 50
09:25 11 slides.

09:25 12 And we have yet to see anything that remotely approaches a
09:25 13 construction from Dr. Larson.

09:26 14 When I started doing arguments, in particular appellate
09:26 15 work, the one thing the older folks told me was when the judge
09:26 16 asks a question, you got to answer it. You can go on and say
09:26 17 other things that you'd prefer to talk about, but you got to
09:26 18 answer the question.

09:26 19 And Your Honor asked the right question at the hearing two
09:26 20 weeks ago. What was the plain meaning construction that
09:26 21 Dr. Larson used? This was the moment of truth if there was
09:26 22 ever going to be one, and I didn't hear it.

09:26 23 We have slides here that Theta has provided to the Court
09:26 24 and Slide 11 references Dr. Larson's report, but just quotes
09:26 25 from the '825 patent. It doesn't even say the words "high" and

09:26 1 "low" in it. Slide 12 is a picture of a document. It doesn't
09:26 2 mention high or low either. It's three lines from Dr. Larson's
09:27 3 report. The rest are documents that counsel spoke to, but
09:27 4 there's nothing from Dr. Larson's report explaining how he
09:27 5 reached his conclusion. That's the sum total of the record in
09:27 6 this case as to how Dr. Larson applied plain meaning.

09:27 7 I think I heard counsel say that he did use the order of
09:27 8 magnitude test. Well, if so, then we have all the problems
09:27 9 that are evident on my chart here. Because if all you need to
09:27 10 do is to show that they're 10 dB apart, then -30 dBm could be a
09:27 11 low signal and -100 could be a high signal. And in that case
09:27 12 we're entitled to judgment of noninfringement, because if
09:27 13 that's the construction he used, it's not plain meaning and
09:27 14 it's not right.

09:27 15 He talked about the worst case. And I think -- you know,
09:28 16 I don't want to be too cute here, but this is the worst of the
09:28 17 worst in a way when it comes to claim construction because they
09:28 18 proposed a construction for worst-case condition, which they
09:28 19 represent is in '825, Claims 3 and 8. That's not even what the
09:28 20 patent says.

09:28 21 The claim term is "worst-case power dissipation condition
09:28 22 from the battery." This patent is about an observation that
09:28 23 Dr. Tsividis made that when the signal strength is low and
09:28 24 there's a lot of interference, that the battery -- the power
09:28 25 consumption will be high. That's what his observation was.

09:28 1 And so the worst case in the claim is the worst-case power
09:28 2 dissipation condition. That means the state in which it's
09:28 3 consuming the most power, and the patent is about ways to
09:28 4 reduce the amount of power consumed.

09:28 5 They've got a construction here that worst-case
09:28 6 condition -- that's not even a claim term -- when a low desired
09:28 7 signal occurs with a high interferer signal. That's not a
09:29 8 construction of a claim term, and it's not a construction of
09:29 9 power dissipation condition.

09:29 10 They're trying to make these claims into a ball of mush so
09:29 11 they can get up in front of the jury and just say, oh, believe
09:29 12 me. The expert's going to put his finger up in the air and
09:29 13 say, here's which way the wind's blowing, we win.

09:29 14 I mean, I was depressed when I read one of their briefs,
09:29 15 not because of the condition of our case but depressed for the
09:29 16 condition of the law, because they actually wrote in their
09:29 17 brief -- when you asked them to explain what their expert had
09:29 18 done, they sent you a brief, the first couple of pages of which
09:29 19 were a -- where we're talking about Dr. Tsividis' resume and
09:29 20 what a wonderful professor he was and some presentation he gave
09:29 21 to Qualcomm, which has no relevance to anything at all in this
09:29 22 case.

09:29 23 And they laid out in their brief for the Court, when they
09:29 24 were supposed to be talking about what their expert did, what
09:29 25 they intend to do in front of this jury. They're going to put

09:29 1 the inventor up there and say he's a nice, esteemed man, give
09:29 2 him some money.

09:29 3 But that's not how we try patent cases. There are claims
09:30 4 that were issued by the Patent Office. These are narrow
09:30 5 claims. The broad claims they wanted, they couldn't get.

09:30 6 These claims have claim terms, "high," "low," "worst-case
09:30 7 power dissipation condition." Those have meaning. But the
09:30 8 meaning is indefinite for high and low because they have yet to
09:30 9 come up with an algorithm from which a skilled in the art -- a
09:30 10 member of skill in the art could take the numbers that are spit
09:30 11 out by that circuit and determine whether they are high or low.

09:30 12 And more importantly, even if they had come up with that,
09:30 13 they haven't disclosed it to us yet. So whatever case they're
09:30 14 going to put on is not what's in their expert reports, and
09:30 15 it's -- they did not use a plain meaning construction.

09:30 16 Now, we have had a highly prejudicial procedure going on
09:30 17 here. You asked them to give a short brief on plain meaning,
09:30 18 and they have tried to turn this into a claim construction
09:30 19 process where we have not had an opportunity to respond. We
09:30 20 have not had an opportunity to provide extrinsic evidence to go
09:31 21 through the file history. That was not what Your Honor
09:31 22 ordered.

09:31 23 We were just chided for not engaging in a supplemental
09:31 24 claim construction process that Your Honor did not order. And
09:31 25 it is not possible, if we're going to do something like that,

09:31 1 to get that done in the next couple of days for the following
09:31 2 reasons:

09:31 3 First, we need time to -- we'd need time to go through the
09:31 4 record. We'd need time to get expert reports together on this
09:31 5 point, but they've put a lot of extrinsic evidence in these
09:31 6 briefs we haven't had an opportunity to respond to.

09:31 7 They don't have an -- whatever construction Your Honor
09:31 8 would come up with is not going to be one that their experts
09:31 9 use, so it'd mean their infringement report would have to be
09:31 10 redone. Same for the invalidity reports.

09:31 11 The damages part -- the damages theory that they have is
09:31 12 tied to an argument that there's a specific amount of savings
09:31 13 and battery life that the phones would get by using the
09:31 14 invention. But if the claim construction changes, the
09:32 15 infringement's going to change. The amount of infringement's
09:32 16 going to change. Their damages numbers are going to go down.
09:32 17 We basically have to redo the whole case.

09:32 18 They shouldn't be allowed to do that. They asked for
09:32 19 plain meaning. Plaintiffs do that. I've been a plaintiff,
09:32 20 I've done it. But when you do that, you take on the burden of
09:32 21 plain meaning. And you can't come and play games at the end of
09:32 22 the case just before trial and say, oh, never mind, my expert
09:32 23 actually gave a report. We did get a construction there, but
09:32 24 now I'd like this construction so I can try to fix things two
09:32 25 days before trial over the holidays. It's not right. It's not

09:32 1 fair. And it violated your order on plain meaning.

09:32 2 Thank you, Your Honor.

09:32 3 MR. JOHANNINGMEIER: May I briefly respond?

09:32 4 THE COURT: Sure.

09:32 5 MR. JOHANNINGMEIER: Just to address the point on needing
09:32 6 time. He mentioned extrinsic evidence that we cited. We got
09:33 7 that extrinsic evidence from their invalidity report and
09:33 8 textbooks that were cited in their invalidity report. [REDACTED]

09:33 9 [REDACTED]

09:33 10 [REDACTED]

09:33 11 [REDACTED] So it's -- you know, it's basically support for
09:33 12 what we've been saying all along. There's nothing new in our
09:33 13 briefs that wasn't added by their expert.

09:33 14 Now, on the construction, again, as we said, we think that
09:33 15 this could be done without a construction simply by precluding
09:33 16 their expert from misusing plain meaning. But to the extent
09:33 17 that Your Honor wants to give something definite to the jury
09:33 18 that will make that concrete, we offered proposals that are, of
09:33 19 course, consistent with the analysis that we gave. The
09:34 20 proposals are consistent with what Dr. Larson did.

09:34 21 Nothing has to change in his report. The input signal
09:34 22 spectrum, being a low, combining with a signal that's high
09:34 23 relative to the desired signal strength gets the concept that
09:34 24 these things are relative into their -- the worst-case
09:34 25 construction gets that these things are -- the worst case is

09:34 1 when a low signal is (interruption) with a high signal. It's
09:34 2 not the maximum ends of the range, right?

09:34 3 These are designed to give authority (interruption) to the
09:34 4 jury without breaking the case. You know, as if we were doing
09:34 5 this during the trial which sometimes happens. Now we're doing
09:34 6 it right before trial to the extent that we want to make sure
09:34 7 that the jury isn't hearing competing definitions of plain
09:34 8 meaning.

09:34 9 One way to do that is by precluding them from saying some
09:34 10 of the things they've said, either now or as it comes up in
09:35 11 trial. Another way to do that is to give a construction that
09:35 12 would rule out shenanigans. So that's why we've offered this.
09:35 13 There's nothing inconsistent. We aren't going to have to redo
09:35 14 our power calculation number. They could have come back with a
09:35 15 kind of proposal. They chose instead to just argue for
09:35 16 reconsideration of Your Honor's ruling last year that these are
09:35 17 definite.

09:35 18 So the prejudice here would be, if Your Honor was to agree
09:35 19 with them, we would have spent a year doing a case on plain
09:35 20 meaning based on Your Honor's order, putting up all of these
09:35 21 experts' reports, everything else. Everything we've been doing
09:35 22 would basically be overturned because they didn't like the
09:35 23 result a year minus two days ago.

09:35 24 That result should stand. These claims are definite.
09:35 25 And that's all I have. Thanks.

09:36 1 (Off-the-record bench conference.)

09:39 2 THE COURT: The Court is going to overrule the motion for
09:39 3 summary judgment and maintain the construction of plain and
09:39 4 ordinary meaning.

09:39 5 The next issue to take up is Samsung's summary judgment of
09:40 6 noninfringement. Who will be arguing that?

09:40 7 MR. CORDELL: I will, Your Honor.

09:40 8 THE COURT: Mr. Cordell?

09:40 9 MR. CORDELL: Thank you.

09:40 10 May I proceed, Your Honor?

09:40 11 THE COURT: Yes, sir.

09:40 12 MR. CORDELL: Ruffin Cordell for Samsung.

09:40 13 Your Honor, we're here this morning to talk about our
09:40 14 motion for summary judgment for noninfringement, and I'm going
09:40 15 to focus on three principal grounds. And it's a little bit
09:40 16 complicated in this case because we've got an array of claims
09:41 17 and we have to make successive arguments in order to reach each
09:41 18 of the asserted claims.

09:41 19 But essentially, the arguments are spread across the claim
09:41 20 pattern. Your Honor's very familiar with these patents.
09:41 21 They're very repetitive. We see the same claim terms, same
09:41 22 claim elements appearing in multiple patents. And so the
09:41 23 arguments are grouped as follows:

09:41 24 There's the no worst-case condition, when the interferer
09:41 25 is high. And you've already had a fair amount of argument

09:41 1 about worst case this morning, but I'm going to continue that;
09:41 2 That there's no required bias adjustments to compensate
09:41 3 for as the system departs from that worst-case condition, which
09:41 4 is a key element of these patents, the idea that when we are in
09:41 5 a worst-case condition and we exit that worst-case condition
09:41 6 there is a prescribed bias adjustment;

09:41 7 And then, finally, you heard some argument this morning
09:41 8 about this notion that you have a desired signal and an
09:42 9 interferer signal and that there must be a comparison. That
09:42 10 some of the claims require a direct comparison between the two.
09:42 11 And it's simply just not done in the accused systems, and
09:42 12 there's no evidence of it in this case.

09:42 13 And essentially what we're talking about here is a
09:42 14 no-evidence summary judgment. The plaintiff took us to task
09:42 15 and said that our motion papers were terse and we were -- you
09:42 16 know, weren't verbose, which I normally appreciate. I'm not
09:42 17 ashamed of that. But these are no-evidence motions. The point
09:42 18 is that we've challenged them to put in the evidence necessary
09:42 19 to survive summary judgment, and they just didn't do it.

09:42 20 So let's start with the first argument about the no
09:42 21 worst-case condition. It applies to the '825 and '202 patents,
09:42 22 Claims 3, 8, 7 and 13.

09:42 23 And the notion is this: And I've got examples from each
09:42 24 of the patents, the '825, Claim 3, for example, wherein a
09:42 25 worst-case power dissipation condition from the battery results

09:42 1 when the signal strength of the desired signal is low and the
09:43 2 signal strength of the interferer signal is high.

09:43 3 Now, we just had a debate about what low and high mean.
09:43 4 And we understand the plain meaning construction that the Court
09:43 5 has prescribed. But the worst case is a little bit different,
09:43 6 and it's important. It's important because these claims have
09:43 7 to mean something, right? We have to know -- we have to be
09:43 8 able to stand in front of this jury and, you know, I'm feeling
09:43 9 for these folks. They're going to be asked to make these
09:43 10 complicated technical decisions based on, you know, what
09:43 11 appears to me, at least, to be a fair number of different
09:43 12 statements from the plaintiff about what this means.

09:43 13 Well, what the patent tells us, what the patent tells us
09:43 14 over and over again is that interferer high and desired signal
09:43 15 low is that worst case. It's a thing. It's not a moving
09:43 16 target. It's not something that changes on Tuesday versus
09:43 17 Thursday. It is a thing.

09:44 18 And when we start from that perspective, the patents
09:44 19 actually begin to make some sense. The idea is that in the
09:44 20 past we had a situation where the -- all of the receivers had
09:44 21 to be tuned for that worst case. You had to be able to recover
09:44 22 that really soft signal against a very loud noise. And so you
09:44 23 cranked up the power. That's the way they worked. And the
09:44 24 whole notion of these patents is that you needed to have that
09:44 25 power there so you could recover that low desired signal.

09:44 1 You start from that point over and over and over again.
09:44 2 And what these patents talk about and Dr. Tsividis' entire
09:44 3 contribution was, was to point out, well, sometimes that
09:44 4 interferer signal comes down and you could turn the power down
09:44 5 a little bit. That's the basic notion. But we have to have
09:44 6 that starting point. We have to have the worst case or none of
09:44 7 this makes sense. And they just haven't been able to show that
09:44 8 in the accused devices.

09:44 9 So what do they do? They look at the accused devices --
09:45 10 and I'll describe this generally, Your Honor. [REDACTED]

09:45 11 [REDACTED]
09:45 12 [REDACTED]
09:45 13 [REDACTED]
09:45 14 [REDACTED]
09:45 15 [REDACTED]
09:45 16 [REDACTED]
09:45 17 [REDACTED]
09:45 18 [REDACTED]
09:45 19 [REDACTED]
09:45 20 [REDACTED]
09:45 21 [REDACTED]

09:45 22 So what Dr. Larson says is the worst case, the highest
09:45 23 power consumption, this Gain State 0, actually corresponds to
09:45 24 when the desired signal and the interferer signal are at their
09:46 25 lowest. We don't have this high interferer/low desired signal

09:46 1 characteristic. It's completely different because the accused
09:46 2 systems work by measuring the amount of power and then trying
09:46 3 to keep the output constant.

09:46 4 So if the input signals are low, the interferer and the
09:46 5 received signals are low, they crank up the power a little bit
09:46 6 because they want the output to be at a determined level. If
09:46 7 they're high, they crank the power down. They do exactly the
09:46 8 opposite of what the patent tells us.

09:46 9 But here's Dr. Larson's problem and Theta's problem. They
09:46 10 say, okay. Gain State 0 is the worst case. That's the one
09:46 11 where the power is maximum. That's the one where you're going
09:46 12 to have all your losses. But then he also has to admit that in
09:46 13 Gain State 0 that interferer is very low. We don't have a high
09:46 14 signal here. We have two low signals.

09:46 15 And he points out that Gain State 0 is the worst case. He
09:47 16 admits that in his expert report. He talks about it. I have
09:47 17 it here in Paragraph 137. He also talks about the Gain State 0
09:47 18 being the worst case in Paragraph 143. He says: The lowest
09:47 19 worst-case gain state, e.g., G0.

09:47 20 He didn't give us any other e.g.s. Only G0, Gain State 0,
09:47 21 was the one that he pointed to. He said: It's the highest
09:47 22 power dissipation in all the components. It's the worst-case
09:47 23 gain state. It is exactly what the patent describes.

09:47 24 But then when we turn to the infringement side of the
09:47 25 coin, he can't make it out. He can't make it out because he

09:47 1 has to admit that in Gain State 0, then it's a very small
09:47 2 received signal power, both desired and interferer.

09:47 3 We don't have that worst case. We don't have the high
09:47 4 interferer and the low desired under any definition, frankly,
09:48 5 because he readily admits that it's a very small received
09:48 6 signal power for both signals.

09:48 7 So they simply just don't have the worst case. They can't
09:48 8 meet the basic threshold of these patents and particularly in
09:48 9 these claims.

09:48 10 Now, you know, they've -- in response, they said, well,
09:48 11 there could be multiple worst cases. Well, there's really not.
09:48 12 You know, there's a -- these patents talk about the worst case,
09:48 13 and they talk about it specifically. They talk about it over
09:48 14 and over again.

09:48 15 If what they wanted to do was to nibble around the edges
09:48 16 and say for a particular device it might be different because
09:48 17 of the way the system is set up, that might be one thing. But
09:48 18 what they're suggesting is that in the same device you could
09:48 19 have a different worst case from moment to moment to moment,
09:48 20 and that's simply not the way these patents are constructed.

09:48 21 They -- in their expert report, Dr. Larson, you know, made
09:48 22 it very clear that G0 is the gain state that he -- he's
09:48 23 pointing to. They have to be held to their representations at
09:49 24 some point. We have to be able to try this case on a rational
09:49 25 and fair basis.

09:49 1 And if they're now going to throw that out the window and
09:49 2 go hunting and pecking for some other set of facts, number one,
09:49 3 that's not in his expert report, so it shouldn't be permitted;
09:49 4 but number two, it's just not allowed.

09:49 5 And the summary judgment process is really designed to
09:49 6 make sure that that doesn't happen, right? They should have
09:49 7 come forward with evidence that they had previously put in, not
09:49 8 attempt to supplement the record at this late stage.

09:49 9 And so the -- the reality is, the patents talk about high
09:49 10 interference/low signal. And when that happens, you
09:49 11 dynamically -- you dynamically change the bias current so that
09:49 12 you can ultimately achieve these power savings, and they just
09:49 13 don't have it.

09:49 14 I show the '202 patent, Claim 7 and 13, that have the same
09:49 15 worst-case characteristic.

09:49 16 So at the end of the day, Your Honor, they just don't have
09:50 17 the worst case. They simply don't. What they pointed to was
09:50 18 G0. G0 does not fit any definition of worst case that we've
09:50 19 heard. It doesn't have the high interferer. It perhaps has a
09:50 20 low signal, but you got to have both in order to have the worst
09:50 21 case. And they just can't make it out.

09:50 22 So they can't leave here and go forward on those claims
09:50 23 without demonstrating to you that in G0 that interferer signal
09:50 24 or the jammers, or whatever they want to call them, come in
09:50 25 high. And if they can't do that, then they can't survive

09:50 1 summary judgment. It's just that simple.

09:50 2 Let's talk about bias adjustments. So this is in the '202
09:50 3 patent, Claim 13, and the '962 patent, Claim 1.

09:50 4 Now, what are the bias adjustments?

09:50 5 So I've got Claim 1 of the '962, and there are really two
09:50 6 flavors of this. One is, it starts again at the worst case,
09:50 7 when the signal strength of the interferer signal is high and
09:50 8 the signal strength of desired signal is low, then the bias
09:50 9 current is increased.

09:50 10 So that's our worst case. That's the streaming that
09:51 11 these -- that these patents, you know, talk about. Making sure
09:51 12 that power's cranked way up so that whatever little desired
09:51 13 signal is there gets passed on down the line and can be
09:51 14 recovered. That is the fundamental first step of every single
09:51 15 one of these claims.

09:51 16 It then goes on in little Roman iii and tells us that when
09:51 17 we -- so remember, we start at the worst case. And then it
09:51 18 says: When the signal strength of the interferer is low and
09:51 19 the signal strength of the desired signal is low, the bias
09:51 20 current of the circuit in the receiver signal path of wireless
09:51 21 transceiver is reduced.

09:51 22 So when we started at the worst case and when the
09:51 23 interferer comes down, the entirety of these inventions talk
09:51 24 about -- or alleged inventions I should say -- talk about
09:51 25 turning down the power. You save some power when that

09:51 1 interferer signal comes down. But you got to have a starting
09:51 2 point. If you don't have a starting point, this all becomes
09:52 3 meaningless.

09:52 4 What we've seen from Theta in the summary judgment process
09:52 5 is an effort to essentially be divorced from any
09:52 6 cause-and-effect relationship whatsoever. They look for any
09:52 7 modification of the bias current, and they say, aha, there's
09:52 8 been a modification of the bias current and that's all that
09:52 9 matters.

09:52 10 But that's not what this says. This says a condition when
09:52 11 the signal strength of the interferer falls, you've got to
09:52 12 reduce the bias current. You start at that worst case, when it
09:52 13 falls, you reduce the bias current. Otherwise these claims
09:52 14 really have no meaning. That ball of mush that Mr. Black
09:52 15 talked about, you know, becomes manifest. They have to meet
09:52 16 these precise claim elements.

09:52 17 So, you know, Dr. Larson points out that, you know, if you
09:52 18 are increasing interference, that the bias current has to go
09:53 19 up. That's his fundamental tenet, that's the fundamental under
09:53 20 current of the patent case.

09:53 21 [REDACTED]

09:53 22 [REDACTED]

09:53 23 [REDACTED]

09:53 24 [REDACTED]

09:53 25 [REDACTED]

09:53 1 So it's a little bit like, you know, when I got ahold of
09:53 2 my sister's stereo set when I was a kid, her Harman Kardon that
09:53 3 she really loved, and all I could do was screw it up. And I,
09:53 4 of course, would crank it up all the time. And she would yell
09:53 5 at me because I was going to blow out our speakers.

09:53 6 [REDACTED]

09:53 7 [REDACTED]

09:53 8 [REDACTED]

09:53 9 [REDACTED]

09:53 10 [REDACTED]

09:53 11 [REDACTED]

09:54 12 [REDACTED]

09:54 13 [REDACTED]

09:54 14 So they have a fundamental problem. [REDACTED]

09:54 15 [REDACTED]

09:54 16 [REDACTED]

09:54 17 [REDACTED]

09:54 18 [REDACTED]

09:54 19 [REDACTED]

09:54 20 [REDACTED]

09:54 21 That's what these -- the accused systems actually do as
09:54 22 opposed to all of the stuff that we've seen in the patent. So
09:54 23 what do they do? [REDACTED]

09:54 24 [REDACTED]

09:54 25 [REDACTED]

09:54 1 [REDACTED]

09:54 2 [REDACTED]

09:54 3 [REDACTED]

09:55 4 [REDACTED]

09:55 5 [REDACTED]

09:55 6 [REDACTED]

09:55 7 So Theta, you know, seems to acknowledge there's been a

09:55 8 little bit of a dispute about whether bias current and gain are

09:55 9 coincident, but I don't think that there really is a dispute

09:55 10 about that. I think everybody understands that when you reduce

09:55 11 the bias current, you reduce gain; when you increase the bias

09:55 12 current, you increase gain. So I don't need to spend much time

09:55 13 on that.

09:55 14 So again, Your Honor, fundamentally, they've got a

09:55 15 problem. Theta's patents tell us, as the interference goes up,

09:55 16 you increase the bias current, crank up the juice. And in the

09:55 17 accused products, it's just the opposite. And they've got a

09:55 18 problem that they can't deal with.

09:55 19 So what do they say?

09:55 20 They say, well, we're going to come up -- in summary

09:55 21 judgment, we're going to give you two new theories. The first

09:55 22 one is the starting point theory, and then the second is the

09:55 23 components theory. And I'll take them each in turn.

09:55 24 So with the starting point theory, what they're basically

09:56 25 saying is, look. You can't be distracted by those claim

09:56 1 elements. You can't be distracted by the idea that you're
09:56 2 supposed to start from a worst case and then you come down from
09:56 3 that.

09:56 4 What they're saying is that, look. If there's any time
09:56 5 you're making adjustments to the bias current and the gain,
09:56 6 then that's good enough. We don't need to worry about those
09:56 7 pesky worst-case recitations in the claims.

09:56 8 But that's not what the claims say. The claims -- and in
09:56 9 their opposition, they talk about the idea that, you know,
09:56 10 every time you make an adjustment, you're doing it in response
09:56 11 to some signal changing. This is from their opposition where
09:56 12 they tell us that the measured signal strengths transition are
09:56 13 sometimes at a high level.

09:56 14 Now, this is a bit of a misnomer. They say high
09:56 15 desired/high interferer. Well, the part has no knowledge of
09:56 16 this. I used to work with a guy that would say that all the
09:56 17 time. Because the Samsung devices just don't know. They don't
09:57 18 know whether it's a high interferer and a high desired signal.
09:57 19 All they know is that it's -- we're getting a high amount of
09:57 20 power in the receiver from whatever source.

09:57 21 And so what they're doing here is they're saying, well,
09:57 22 look. If you have that, that could be a worst case; and then
09:57 23 when you transition down from that, then perhaps you'll be, you
09:57 24 know, moving into a low -- a lower signal level.

09:57 25 But, Your Honor, the reality here is when that happens,

09:57 1 you get an increase in bias current, not a decrease. And they
09:57 2 actually tell us that at the end of this particular paragraph.

09:57 3 So imagine that we're going to allow them to shift around
09:57 4 and make their worst case a -- you know, a high-high and then
09:57 5 go to a low, which is nowhere in these patents, but it results
09:57 6 in an increase in bias current, not a decrease. So we're not
09:57 7 saving power, we're actually wasting power.

09:58 8 And the claim elements are pretty specific here. We can't
09:58 9 simply ignore that. We know that there are two separate,
09:58 10 distinct requirements.

09:58 11 And so we can't just pick and choose any one case and say,
09:58 12 well, you know, for Claim Element, you know, i, we're going to
09:58 13 look at the system on Tuesday; and for iii, we're going to look
09:58 14 at it on Thursday.

09:58 15 The system is the system, and the conditions that are set
09:58 16 forth have to be satisfied. You've got to satisfy each and
09:58 17 every one of them.

09:58 18 And it tells us that when the signal strength of the
09:58 19 interferer is low and the signal strength of the desired signal
09:58 20 is low, the bias current is reduced. So we can stop right
09:58 21 there for Claim 1 of the '962 patent, because whatever
09:58 22 definition change they give it, the interferer signal is low
09:58 23 and the desired signal is low.

09:58 24 [REDACTED]
09:58 25 [REDACTED]

09:58 1 [REDACTED]

09:59 2 [REDACTED]

09:59 3 [REDACTED]

09:59 4 And on Slide 23, I've reproduced part of what they're --

09:59 5 they're pointing to the chart again. [REDACTED]

09:59 6 [REDACTED]

09:59 7 [REDACTED]

09:59 8 [REDACTED]

09:59 9 [REDACTED]

09:59 10 [REDACTED]

09:59 11 [REDACTED]

09:59 12 [REDACTED]

09:59 13 [REDACTED]

09:59 14 So now they moved to a different argument. They say,

09:59 15 well, it could be components. You could have different parts

09:59 16 along the signal pathway. Where in one of them you might have

09:59 17 a bias current increased or decreased. Well, that's a

09:59 18 completely new position. And you know that because what they

09:59 19 reproduced in their brief was a bunch of annotations that the

09:59 20 lawyers have added, not what their expert talked about. And

10:00 21 that of course is not the way we try cases.

10:00 22 I think that theory is completely wrong. I think there's

10:00 23 no evidence of this. I think they're just guessing at the

10:00 24 different components along the pathway. But what we absolutely

10:00 25 can't do is let them supplement their expert's report with

10:00 1 attorney annotations on a document.

10:00 2 And, you know, perhaps most importantly, when we asked
10:00 3 Dr. Larson about this, he was pretty candid that he didn't do
10:00 4 that analysis. He didn't do this component-by-component
10:00 5 analysis. And he's pretty -- was pretty candid with us that
10:00 6 it's not in this report. And as you know, if it's not in a
10:00 7 report, it's not in the trial. And that's really where that
10:00 8 should stop.

10:00 9 There's one other point on the components argument that I
10:00 10 should raise, which is the only analysis they've done was of
10:00 11 the Beamer version of the products. But there are six or seven
10:00 12 other versions. So if the only evidence they have is for the
10:01 13 Beamer design documents, then that's deficient. That leaves
10:01 14 out a large swath of the products.

10:01 15 So with that, there just is no required adjustments. The
10:01 16 fundamental tenet of these patents is when you go from high to
10:01 17 low, you turn down the power. It's exactly the opposite in the
10:01 18 accused devices, and they need to explain that to you if they
10:01 19 want to proceed.

10:01 20 So finally, the comparing to the desired interferer.
10:01 21 We've heard over and over again this morning how important the
10:01 22 high interferer and low signal is, low desired signal. And
10:01 23 that comparison is manifest in the '202 patent in Claim 7 and
10:01 24 13.

10:01 25 And you see it on Slide 28, the claim elements actually

10:01 1 require that you do a comparison. You have to compare the
10:01 2 strength. You got to ascertain the strength of the desired
10:01 3 signal relative to the strength of interferer signal. That
10:01 4 means you got to measure them or know what they are in some
10:01 5 fashion and you got to compare one to the other.

10:01 6 There might be different ways to do that. I have, you
10:01 7 know, three children and I can compare their heights. I can
10:02 8 put them back to back. I can measure them and look at numbers.
10:02 9 There are a lot of different ways I could do that, but you got
10:02 10 to make the comparison. I've got to know how tall they are and
10:02 11 I've got to compare them in order to satisfy that element. The
10:02 12 same is true with these signals.

10:02 13 In Dr. Larson's report we were very keen to look for
10:02 14 these. We were very keen to try to find where he was going to
10:02 15 do this, because we don't see the comparison anywhere. So we
10:02 16 studied long and hard. And it's funny, he talks about it, and
10:02 17 he says, oh, it's in there. It's like the pasta sauce. It's
10:02 18 in there somewhere.

10:02 19 [REDACTED]
10:02 20 [REDACTED]
10:02 21 [REDACTED]
10:02 22 [REDACTED]
10:02 23 [REDACTED]
10:03 24 [REDACTED]

10:03 25 But he doesn't do that. He doesn't show us where they're

10:03 1 doing any comparison. He doesn't tell us where they're doing
10:03 2 any measurement. And in order for me to know whether my one
10:03 3 kid is taller than the other, I got to do the measurement. If
10:03 4 I don't do the measurement and then I don't do the comparison,
10:03 5 I obviously haven't accomplished the process.

10:03 6 And that's it. What we show on Slide 29 is the sum total
10:03 7 of his analysis of these comparison elements. And it's a
10:03 8 problem, right? We're supposed to try this case. We're
10:03 9 supposed to determine whether or not these parts do these
10:03 10 claims, and we just can't do it.

10:03 11 So we asked him in deposition. You know, Dr. Larson,
10:03 12 where is it? You know, with those same paragraphs, where is it
10:03 13 that you show us, that you're ascertaining those signals and
10:03 14 then you're doing a comparison? And he said, well, I haven't
10:03 15 explicitly shown that.

10:03 16 And when he says that the adjacent channel signal to the
10:03 17 desired signal, the adjacent channel is really another way of
10:04 18 saying the noise, you know, the non-desired signals. I haven't
10:04 19 shown that. He was pretty candid.

10:04 20 So how are we supposed to try this case, Your Honor? How
10:04 21 am I supposed to cross-examine him and show the jury that he
10:04 22 didn't do this? Because what I'm going to get is what I got in
10:04 23 their summary judgment motion. What I got in their summary
10:04 24 judgment opposition was a citation to a bunch of impenetrable
10:04 25 source code. A bunch of signal pathways and symbols that are,

10:04 1 you know, 18 characters long, each and every one of them. And
10:04 2 they don't show any such comparison. I got two and a half
10:04 3 pages of attorney argument.

10:04 4 And you can see it at Pages 17 and 18 of their brief. I
10:04 5 wish I'd blown this up a little better, but you can see some of
10:04 6 the source code that they cite.

10:04 7 So what they've got is they've got their lawyer standing
10:04 8 up and saying, well, we can find the comparison. We're going
10:04 9 to show this jury a bunch of impenetrable technical documents
10:04 10 that make no sense to real people and never say the word
10:04 11 "comparison." There's not a real-world cue that they can pick
10:05 12 up from these.

10:05 13 And so what we're left with is their expert saying, at a
10:05 14 very high level, it's in there. And that's as far as they'll
10:05 15 go. And it's just not fair at the end of the day.

10:05 16 So it's -- you know, the orderly process of these cases is
10:05 17 supposed to be that we get the evidence. When we file a
10:05 18 no-evidence summary judgment motion, they come forward with
10:05 19 something we can actually point to or they can point to, and
10:05 20 that just didn't happen here.

10:05 21 So at the end of the day, Your Honor, there is no evidence
10:05 22 of this comparer, and Claims 7 and 13 should be adjudicated
10:05 23 now.

10:05 24 And with that, unless there are any questions, I'll pass
10:05 25 the podium.

10:05 1 THE COURT: Very good.

10:05 2 MR. CORDELL: Thank you.

10:05 3 THE COURT: If it doesn't screw you up too much to do it
10:05 4 this way, if you could address the comparison issue to start
10:05 5 off with --

10:05 6 MR. JOHANNINGMEIER: Yes. Sure, Your Honor.

10:05 7 THE COURT: -- since it's the freshest in my mind.

10:05 8 MR. JOHANNINGMEIER: Yes. And actually, let's see. For
10:06 9 that one maybe we should go with the paper slides --

10:06 10 THE COURT: Okay.

10:06 11 MR. JOHANNINGMEIER: -- because I've got code on them.

10:06 12 (Off-the-record discussion.)

10:06 13 MR. JOHANNINGMEIER: So let's go with -- it's starting at
10:06 14 Slide 45.

10:06 15 MS. DE MORY: Can I ask just a clarified question? Does
10:06 16 this screen -- is this shown publicly?

10:06 17 THE COURT: I don't think so.

10:06 18 MS. DE MORY: Yeah. And I don't think there's anyone in
10:06 19 the courtroom who can't see it, and I think Mr. Cordell put
10:06 20 some source code in the confidential documents on the screen as
10:06 21 well.

10:06 22 MR. CORDELL: I tried not to. Not anything extensive,
10:06 23 other than just a gain state document.

10:07 24 MR. JOHANNINGMEIER: Well, I don't want to mess anyone up.
10:07 25 I mean, I'm happy to use the paper. I mean, I just...

10:07 1 MR. CORDELL: One of the issues we're going to have to
10:07 2 confront sooner or later, Your Honor, is unfortunately
10:07 3 Mr. Kahng from Samsung is here, and Samsung and Qualcomm are
10:07 4 competitors.

10:07 5 So when we show Qualcomm's source code, they get very
10:07 6 agitated about showing that to Qualcomm (sic). So we're going
10:07 7 to -- one of the things we're going to have to deal with in
10:07 8 trial is, I'm going to have to excuse our client
10:07 9 representatives whenever we go into that.

10:07 10 THE COURT: Understood. Let's move forward. And if the
10:07 11 Samsung counsel believes you're showing anything that needs to
10:07 12 be taken down, just take it down and I'll --

10:07 13 MR. JOHANNINGMEIER: Okay.

10:07 14 THE COURT: Yeah. I don't think there will be any harm
10:07 15 done --

10:07 16 MR. CORDELL: So for example, Your Honor, this algorithm,
10:07 17 I think, is part of the Qualcomm --

10:07 18 THE COURT: Got it. And so Qualcomm might have a concern.

10:07 19 MR. JOHANNINGMEIER: Let's take this slide off.

10:07 20 THE COURT: Okay.

10:07 21 MR. JOHANNINGMEIER: Okay. So address the comparison one
10:07 22 first as to the '202 patent.

10:08 23 Mr. Cordell's description of what happened isn't exactly
10:08 24 accurate. Dr. Larson didn't say he hadn't shown this. He got
10:08 25 a lot of questioning. The form of the questioning was sort of,

10:08 1 where is it in this paragraph? He has a long report. His
10:08 2 report cross-references -- they were looking at particular
10:08 3 paragraphs and saying where was it?

10:08 4 And, you know, to be completely honest, he didn't remember
10:08 5 at the time the source code citations that are elsewhere. But
10:08 6 it's in his report. It's clearly in his report. And you can
10:08 7 see on this slide we cited it from his report.

10:08 8 So this is a no-evidence summary judgment motion. We put
10:08 9 the evidence in the brief, his testimony, right? His
10:08 10 testimony's very clear. He thinks the comparison is done.
10:08 11 He's got examples of it. It's lengthy. I won't belabor it or
10:08 12 go through it all.

10:08 13 [REDACTED]

10:08 14 [REDACTED]

10:09 15 [REDACTED]

10:09 16 [REDACTED]

10:09 17 [REDACTED] And

10:09 18 Dr. Larson says that is a comparison, right? I mean, you're
10:09 19 taking a difference between two numbers and then comparing the
10:09 20 second one to a threshold. He says that meets it.

10:09 21 On summary judgment the Court can't decide he's wrong.
10:09 22 This is a -- this is evidence that's in the case that we can
10:09 23 present. Now, counsel can call it impenetrable. He can accuse
10:09 24 it of being attorney argument. It's not attorney argument, it
10:09 25 is the evidence in the case.

10:09 1 So there is a subtraction --

10:09 2 THE COURT: And maybe I just had a senior moment. I was
10:09 3 reading something from one of my clerks. But the information
10:09 4 that is in -- that Mr. Cordell referenced that was in the
10:09 5 lawyer documents, is all that information -- was that all
10:09 6 disclosed in the expert's report as well?

10:10 7 MR. JOHANNINGMEIER: Yes. So he cites to this code. He
10:10 8 cites to these documents.

10:10 9 THE COURT: Okay. I'm just saying, maybe I misunderstood
10:10 10 what Mr. Cordell said, that you all had -- I got the sense that
10:10 11 you all had supplemented what had been done in what was filed.
10:10 12 And I just -- what I'm trying to figure out is what you used
10:10 13 for supplementation, was it already in the expert's report?
10:10 14 Did he rely on it?

10:10 15 MR. JOHANNINGMEIER: It's cited. So this one here in
10:10 16 particular, just to use an example, is from documents that he
10:10 17 cited, and so -- and code that he cited.

10:10 18 Now, we looked at thousands and thousands of code files.
10:10 19 I think there's 5,000 pages of printed source code. So he
10:10 20 didn't go line by line and put it all in there, but he cited
10:10 21 to -- he did actually cite to this particular code file in his
10:10 22 report and these particular lines that we've put here.

10:10 23 Now, it's not in the paragraph, that 212 that he
10:10 24 mentioned. It's in another paragraph in another section that
10:11 25 he cross-references. He says, as in, you know, element

10:11 1 whatever, I described this in conjunction with this algorithm.
10:11 2 And then he mentions this flowchart and he cites this document.
10:11 3 He doesn't reproduce the flowchart in his report. We put it
10:11 4 here, but he does cite to it. So it's disclosed to the other
10:11 5 side. I mean, they can try to penetrate the source code. I
10:11 6 mean, I realize it's complicated stuff, but we've pointed out
10:11 7 what we were relying on in the report for this stuff.

10:11 8 So this is, you know, just one example and then there's
10:11 9 testimony in our brief on these as well. There's another
10:11 10 example, the second one on here is this deficit bias
10:11 11 calculation.

10:11 12 Now, again, he cites to this file. He doesn't
10:11 13 specifically discuss this calculation, but these are all
10:11 14 documents that are in his report. I actually did some of this
10:11 15 code with Dr. Kiaei, their expert, and he talked about it as
10:12 16 well and gave some admissions on it that, you know, as we say
10:12 17 in our brief, are also sufficient to defeat summary judgment.

10:12 18 So there is, we think, ample evidence in the case of
10:12 19 multiple places where this comparison stuff is done.

10:12 20 Now, they may disagree with Dr. Larson's interpretation
10:12 21 about whether or not a subtraction followed by a threshold
10:12 22 comparison is equal to the claims, but that's just, you know,
10:12 23 for the jury to hear. It's not summary judgment. There is a
10:12 24 genuine issue here about whether comparison was done.

10:12 25 So if Your Honor doesn't have any more questions on that,

10:12 1 I can switch to the other one.

10:12 2 THE COURT: Sure.

10:12 3 MR. JOHANNINGMEIER: Okay. So they did worst case first,
10:12 4 so let's talk about that one. And then we can put this one up
10:12 5 on the screen -- this is Slide 44 -- or you can look at it.

10:12 6 So the bottom line on this is that Dr. Larson did find the
10:13 7 worst case in Gain State 0. They suggested he did not. He
10:13 8 did.

10:13 9 Their belief that he did not is based on the argument I
10:13 10 mentioned a little bit earlier about how their expert says,
10:13 11 well, a -45 dBm jammer can't be high because there's other
10:13 12 states where there's higher jammers.

10:13 13 [REDACTED]

10:13 14 [REDACTED]

10:13 15 [REDACTED]

10:13 16 [REDACTED]

10:13 17 [REDACTED]

10:13 18 [REDACTED]

10:13 19 [REDACTED]

10:13 20 [REDACTED]

10:13 21 [REDACTED]

10:14 22 [REDACTED]

10:14 23 [REDACTED]

10:14 24 [REDACTED]

10:14 25 in there as well.

Those are

10:14 1 The -- this worst case isn't only limited to Gain 0.
10:14 2 That's their interpretation of this, but it's not. But he did
10:14 3 find it in Gain 0, so their summary judgment motion has to be
10:14 4 denied just based on that point.

10:14 5 He found it in other places. I think it was -- that's
10:14 6 actually on the earlier slides. In 12 and 13, you can see it
10:14 7 in the -- on Slide 13, you can see the same worst-case scenario
10:14 8 with the low interferer and the high jammer in other gain
10:14 9 states, Gain State 1, Gain State 2.

10:14 10 [REDACTED]

10:14 11 [REDACTED]

10:14 12 [REDACTED]

10:15 13 [REDACTED] And he found that in each one of
10:15 14 those, which is why, when asked in deposition, he testified
10:15 15 that there could be multiple worst cases at different points in
10:15 16 the overall range of the device.

10:15 17 They're suggesting that that's not right, that you can
10:15 18 have only, you know, the very lowest of the low and the very
10:15 19 highest of the high. That's just not the plain meaning of this
10:15 20 term. So we're kind of back to the same argument here.

10:15 21 But at bottom, he did find it in Gain State 0. He
10:15 22 described how the chip reacts to that, what it does. It does
10:15 23 do the required adjustment from that point. When the -- when
10:15 24 it's in the worst case and the signal goes up, it does the
10:15 25 required adjustment to the bias that's in the claims. And

10:15 1 that's clearly in his report.

10:15 2 So this is just another one where the evidence is there.

10:15 3 We put it in our brief. Their one page on this no-evidence

10:15 4 summary judgment motion should be denied.

10:16 5 And then, finally, on the bias adjustment one, you can
10:16 6 look at Slide 40 and 41.

10:16 7 Now, Claim 1 of the '962 and Claim 13 of the '202 have a
10:16 8 clause that requires a decrease in response to a particular
10:16 9 change. The other claims have a different requirement where
10:16 10 the bias current would be increased in similar situations.

10:16 11 Those aren't at issue for this.

10:16 12 So the claims at issue here, Claim 1, they filed a motion
10:16 13 saying we hadn't shown this anywhere. [REDACTED]

10:16 14 [REDACTED]

10:16 15 [REDACTED]

10:16 16 [REDACTED]

10:16 17 [REDACTED]

10:16 18 [REDACTED]

10:17 19 [REDACTED]

10:17 20 [REDACTED]

10:17 21 Now, he also said that has to be in Gain 0. The only
10:17 22 place this could happen is Gain 0. Well, that's just nonsense,
10:17 23 that's not what the claim requires. That's something that
10:17 24 they've attempted to impose on this. That -- it's just -- it
10:17 25 doesn't come from anywhere.

10:17 1 So he showed this. Now, these annotations in red are
10:17 2 stuff that we put on to explain it, but these charts are in his
10:17 3 report. And he explained it in his deposition, as is in our
10:17 4 brief.

10:17 5 Now, we heard -- I heard Mr. Cordell talk about the total
10:17 6 power. Well, let me be clear here. There is a total power,
10:17 7 the RSSI, but in their own brief at Page 4 they admit that that
10:17 8 is a combination of the desired strength and the interferer
10:17 9 strength. [REDACTED]

10:18 10 [REDACTED]

10:18 11 [REDACTED]

10:18 12 [REDACTED]

10:18 13 [REDACTED]

10:18 14 [REDACTED]

10:18 15 [REDACTED]

10:18 16 [REDACTED]

10:18 17 [REDACTED] And so it meets the claim
10:18 18 elements. And when it does -- when the code reacts to an
10:18 19 increase by decreasing, as we see here, then it meets these
10:18 20 particular elements of the claims. So this is evidence of
10:18 21 those elements being met in those gain state transitions for
10:18 22 these two products.

10:18 23 [REDACTED]

10:18 24 [REDACTED]

10:19 25 And this is one where actually Dr. Larson mentioned this in his depo. It's in

10:19 1 his report. [REDACTED]
10:19 2 [REDACTED]
10:19 3 [REDACTED]
10:19 4 [REDACTED] So it's an example of infringement
10:19 5 of these particular claims. So this is the evidence for their
10:19 6 no-evidence summary judgment motion. The motion should be
10:19 7 denied.

10:19 8 Again, I heard Mr. Cordell say that Larson -- Dr. Larson
10:19 9 didn't do the analysis and didn't do it. It's not in his
10:19 10 report. He didn't say that. He did the analysis. It's in his
10:19 11 report. These are the examples.

10:19 12 They want to say that these little -- that these
10:19 13 individual transitions don't matter, but they do. These
10:19 14 individual transitions infringe when that happens in the
10:19 15 circuit. And then the overall -- the overall gain may go one
10:19 16 way but the individual component gains go another way. That
10:19 17 infringes the claims, and Dr. Larson has shown how that's done.

10:20 18 So unless Your Honor has any questions, that's it for me.

10:20 19 THE COURT: I'm good.

10:20 20 MR. JOHANNINGMEIER: Thank you.

10:20 21 THE COURT: Mr. Cordell?

10:20 22 MR. CORDELL: So if I could begin with the comparing. And
10:20 23 actually, could I keep the plaintiff's slides and could you go
10:20 24 to Slide 44, please?

10:20 25 I can do it on the ELMO. 44? Oh, sorry. Would you

10:20 1 believe 45?

10:20 2 Looks like my slides have a different numbering than --

10:20 3 actually, could I just have the ELMO?

10:21 4 Okay. So counsel showed you two slides that -- mine's 45,

10:21 5 but I think his -- well, I'm not sure what it was. But you'll

10:21 6 recall the algorithm, Your Honor, which I hopefully am just

10:21 7 publishing to Your Honor and the well. And the citation they

10:21 8 give us is to Dr. Larson's report at Paragraph 134.

10:21 9 So I pulled out Paragraph 134. And this is part of the

10:22 10 source code analysis, but this is the entirety of Paragraph 134

10:22 11 from Dr. Larson's report. And there are a couple of important

10:22 12 points here.

10:22 13 Number one, this relates to the '825 patent which does not

10:22 14 have the comparing limitation in it at all, right? So the

10:22 15 claims that I'm analyzing here are the one -- are the comparing

10:22 16 claims, not the '825 at all.

10:22 17 So when we're talking about the '202, and it's -- just to

10:22 18 make sure I have the claim numbers correct -- it's Claim 7 and

10:22 19 13. Those are the ones that have the comparing limitations in

10:22 20 them. So we start from that proposition, that they're

10:22 21 expecting us to go to a different patent on a different issue.

10:22 22 Number two, this Paragraph 134 is analyzing the preamble

10:22 23 of the '825 patent claims. So it's not even -- it's not even

10:23 24 beyond the substance -- or into the substance other than

10:23 25 they're supposed to show some power savings.

10:23 1 So somehow we're supposed to divine from this citation,
10:23 2 which I won't read into the record because it's highly
10:23 3 confidential, but it goes on for, I don't know, 20 characters
10:23 4 lots of underscores and slashes. And yet, I'm supposed to know
10:23 5 that that's where to find the comparing evidence.

10:23 6 Counsel also showed you Slide, what for me is 46, which,
10:23 7 again, has some source code on it. Again, impenetrable source
10:23 8 code. Source code that doesn't -- to normal people would never
10:23 9 tell us that this is -- that this is the comparing limitation.

10:23 10 And here we cite -- they cite Paragraph 728 of
10:23 11 Dr. Larson's report. And, again, with a very long source code
10:23 12 citation. Counsel's correct, there are thousands of source
10:23 13 code files. But my clairvoyant powers aren't good enough to
10:24 14 know that, oh, I should have been looking at this for the
10:24 15 comparing limitation.

10:24 16 So you go to Paragraph 728. And there, again, we're
10:24 17 talking about the '825 patent. We're not talking about the
10:24 18 '202 patent at all. And all it tells us is that there are --
10:24 19 there is firmware that is using certain functions. And that's
10:24 20 it, and that's what I got.

10:24 21 So the reality is there is no evidence here. And counsel
10:24 22 did a valiant -- you know, made a valiant attempt at trying to
10:24 23 point us to where it might be somewhere in the evidentiary
10:24 24 record. That doesn't mean that it's part of the evidentiary
10:24 25 record at trial. So the fact that Dr. Larson relied on a chunk

10:24 1 of source code for some purpose doesn't mean he can rely on it
10:24 2 for this purpose. So there simply is no evidence of that
10:24 3 comparing limitation.

10:24 4 With respect to the worst-case conditions argument, the
10:24 5 reality is they point to G0. They point to G0 over and over
10:24 6 again, that's the gain state they're stuck with. And it's
10:25 7 undisputed that in Gain State 0 you have low desired signal and
10:25 8 low interferer.

10:25 9 Counsel said a couple of times that somehow -- somehow
10:25 10 Samsung determines the value of the interferers and determines
10:25 11 the value of the desired signal. There's no evidence of that
10:25 12 at all. In fact, the evidence shows they just take whatever
10:25 13 comes in and they test to see how much power it carries, and
10:25 14 that's it.

10:25 15 They deal with the noise, they deal with the desired
10:25 16 signal downstream someplace. And that's a result of the
10:25 17 progress of technology. Way back when, maybe they had to do it
10:25 18 the way the patents talk about, but today they just don't. So
10:25 19 there's no evidence of that.

10:25 20 And they can't show you anything where in Gain State 0
10:25 21 you've got a high noise signal interferer, jammer, whatever you
10:25 22 want to call it. And unless they can, they can't survive the
10:25 23 worst-case conditions.

10:25 24 And with respect to the adjusting the bias argument, you
10:26 25 know, again, counsel did a valiant job of trying to go in and

10:26 1 find components where the bias currents are adjusted. But his
10:26 2 expert didn't do it. He didn't do it. And, you know, with
10:26 3 this level of complexity, it's simply not fair for him to stand
10:26 4 in front of a jury and walk them through source code and say,
10:26 5 ha, you know, Element 47 in the path has a bias adjustment,
10:26 6 therefore that somehow qualifies. That's just not the way the
10:26 7 process works.

10:26 8 And even if he could, what he can't show is that coming
10:26 9 off of that worst-case condition where the interferer is high
10:26 10 and the desired signal is low, somehow the bias currents are
10:26 11 decreased. Because it's just the opposite. When we come off
10:26 12 of that high interferer signal, bias current are increased.

10:26 13 And I have to make one comment about the -- an argument
10:26 14 that I heard this morning. Because when we're looking at the
10:26 15 worst case, I heard something new today. But it's indicative
10:26 16 of the problems we're going to have in trial.

10:27 17 You know, the third order intercept. I actually wrote it
10:27 18 down to make sure I got it right. We're going to be looking
10:27 19 for the third order intercept of a signal to know whether it's
10:27 20 low.

10:27 21 And, Your Honor, that's the kind of thing that we just
10:27 22 can't burden the good people of Waco with. I mean, that's
10:27 23 just -- you know, can you imagine what they'll throw at us if
10:27 24 we expect them to make those decisions?

10:27 25 So with that, Your Honor, I'll pass the podium unless

10:27 1 there are any questions.

10:27 2 THE COURT: Counsel, if you would, as directly as
10:27 3 possible, address Mr. Cordell's argument about the fact that
10:27 4 the bias current is actually increased.

10:27 5 And then also if you'll address his concern that the
10:27 6 section of the expert report that you're relying on applied to
10:27 7 a different patent. Both those issues I'd like to --

10:27 8 MR. JOHANNINGMEIER: That one's easy, Your Honor.

10:28 9 I mean, basically the paragraphs that he cites refers --
10:28 10 so he -- Dr. Larson goes through the claims of the '825 patent
10:28 11 first. So he analyzes Claim 3 in extreme depth with going into
10:28 12 all the code. And then when he gets down to the other claims,
10:28 13 in multiple places he says "as I talked about in -- with
10:28 14 respect to Element 3[c] or with Element 3[a]," so it's -- you
10:28 15 know, because it is the same functionality for both patents.

10:28 16 And so when the same element appears, he basically refers
10:28 17 back. So the reference does cross the boundary into his
10:28 18 analysis of the previous patent. But as far as the code and
10:28 19 the chips go, it's the same chips and the same code that he's
10:28 20 analyzing. So it's just a, you know, cross-reference that --
10:28 21 you know, but it's there and it's clear and they can follow it.

10:28 22 There's a lot in his report and there's a lot of documents
10:28 23 and code cited, but we try to make it as clear as possible of
10:28 24 what he was relying on.

10:28 25 The other thing I would point out, with respect to some of

10:28 1 that comparing code, their expert went through it as well. He
10:29 2 went through in-depth, right? And actually, interestingly,
10:29 3 with respect to this comparison stuff, he mentioned the deficit
10:29 4 bias thing that was shown in my Slide 46.

10:29 5 But if you look at his code analysis, he walks through
10:29 6 that same code file, and then he stops talking about it at
10:29 7 Line 1966. But the code that we cited here is like four lines
10:29 8 later. It's -- he literally just walks all the way through the
10:29 9 code until he gets to that part that he doesn't like because
10:29 10 it's got a comparison in it and stops talking about the code.

10:29 11 They had the code. They looked at the code. Their expert
10:29 12 looked at the code. There's no -- you know, Mr. Cordell's
10:29 13 concern with whether or not we can explain this to the good
10:29 14 people of Waco is -- you know, it's on us to do. We're going
10:29 15 to bring in professors and explain this to them in our best
10:29 16 possible way, but this is a summary judgment motion and the
10:29 17 evidence is there.

10:29 18 So now, you asked about the increased bias point for the
10:30 19 '962, Claim 1, I believe. Because I heard him talking about
10:30 20 the -- I'm trying to make sure which one we're talking about,
10:30 21 but with respect to the increased bias for the -- the '962, I
10:30 22 mean, there's examples in there, as I showed you, of that
10:30 23 occurring. The overall -- there's cases where the overall gain
10:30 24 increases but the component gain drops, decreases. So that's
10:30 25 clearly shown.

10:30 1 [REDACTED]
10:30 2 [REDACTED]
10:30 3 [REDACTED]
10:30 4 [REDACTED] It's in the report,
10:30 5 it's in the code.

10:30 6 [REDACTED]
10:30 7 [REDACTED]
10:30 8 [REDACTED]
10:31 9 [REDACTED]
10:31 10 [REDACTED]
10:31 11 [REDACTED]
10:31 12 [REDACTED]
10:31 13 [REDACTED]
10:31 14 [REDACTED]
10:31 15 [REDACTED]

10:31 16 Thanks, Your Honor.

10:31 17 THE COURT: Mr. Cordell, anything else?

10:31 18 MR. CORDELL: Only this, Your Honor. The '825 patent
10:31 19 doesn't have the comparing limitation in it at all. So
10:31 20 there's -- the citations back to the '825 patent don't do us
10:31 21 any good. It's just not there.

10:31 22 THE COURT: A response to that?

10:31 23 MR. JOHANNINGMEIER: Well, the citations are to the
10:31 24 analysis of the device that he did for the other patents. So
10:32 25 he analyzes the device and says, okay, well, this functionality

10:32 1 of the device does X, Y and Z. And then when he gets down to
10:32 2 the comparing step, he refers back. So the analysis is not --
10:32 3 you know, the claim terms are very similar. There is no
10:32 4 comparing step, right? But he does call back to the previous
10:32 5 analysis and the previous code.

10:32 6 So, I mean, that's the citation that he makes. And if you
10:32 7 follow the chain of his citations, you get to these files, you
10:32 8 get to this code. Their expert was able to do it. And this
10:32 9 is, again, a summary judgment motion. So if the question is,
10:32 10 is the evidence weak or hard to follow, that's maybe something
10:32 11 for Mr. Cordell to, you know, cross Dr. Larson on. But there
10:32 12 is a genuine issue in the report about the evidence here.

10:32 13 THE COURT: Mr. Cordell?

10:32 14 MR. CORDELL: Well, what we're talking about here are
10:32 15 broad citations to code. And the question becomes when -- and
10:33 16 I showed you the two paragraphs he relies on. You know, those
10:33 17 broad citations to source code that has, you know, thousands of
10:33 18 lines in it. Analysis for the '825 patent doesn't mention
10:33 19 comparing, so there was no reason for us to then have decided
10:33 20 to look into those files. He seems to suggest that because we
10:33 21 could perhaps figure out the answer, doesn't answer the
10:33 22 fundamental question which is whether or not they put the
10:33 23 evidence in the record. And they didn't. And because they
10:33 24 didn't, they can't survive summary judgment.

10:33 25 THE COURT: Counsel?

10:33 1 MR. JOHANNINGMEIER: What he put in his report was a
10:33 2 citation to the other part of his report where he did the
10:33 3 analysis of the device. So he gave them the citation to
10:33 4 follow. The fact that it's in a different section is
10:33 5 irrelevant. If you go to the paragraphs that he cites, you
10:33 6 find the discussion of the padding algorithm, for instance, and
10:33 7 the citation to the flowchart, and the comparison is there. So
10:34 8 that's what's in his report.

10:34 9 MR. CORDELL: Just to be clear, Your Honor, this, you
10:34 10 know, flowchart is not in his report. That's not the -- that's
10:34 11 an exhibit. That's a document that we would have had to have
10:34 12 dug out in order to have found what they're now telling us is
10:34 13 where the comparison step takes place. There's just no reason
10:34 14 for us to have done that. It's a different patent, it doesn't
10:34 15 have the comparing limitation in it. And the fact that he
10:34 16 cited a chunk of source code somewhere in his report doesn't
10:34 17 answer the question.

10:34 18 MR. JOHANNINGMEIER: Well, Your Honor, I don't want to
10:34 19 keep popping up here, but, I mean, the issue with the report is
10:34 20 that, you know, we have a lot of code. We have a lot of
10:34 21 documents. We cited to them. He can't put all the code in his
10:34 22 report, for one thing. He put in the citations. He put in the
10:35 23 cross-reference.

10:35 24 The issue on summary judgment isn't whether or not they
10:35 25 did or did not follow the citations or whether they chose to

10:35 1 just cross-examine him on Paragraph 212 and say, where is this
10:35 2 in Paragraph 212? Which is what they actually did.

10:35 3 When their expert was looking at this code, he found the
10:35 4 file, he analyzed the file. He went through. He stopped a few
10:35 5 lines before the part where there's a comparison. I think
10:35 6 that -- he clearly did the analysis. He was in the right
10:35 7 files, he could have seen it, he could have responded to it.
10:35 8 He chose not to. When I asked him about it in deposition, he
10:35 9 got pretty cagey. I think we put the answers in the brief.

10:35 10 But this is a case where they were able to figure out how
10:35 11 this works. They didn't like the result, so they tried to do a
10:35 12 where-is-it-in-your-report game in deposition. We've now shown
10:35 13 where the stuff is, and I guess that's the best we can do, Your
10:35 14 Honor. Thanks.

10:35 15 MR. CORDELL: Again, I -- now I'm belaboring it, Your
10:36 16 Honor. The process is supposed to be rational. We're supposed
10:36 17 to have the disclosure. They didn't make the disclosure. I
10:36 18 think I just heard counsel, you know -- I admire his candor.
10:36 19 He said that the expert stopped a few lines before. Well,
10:36 20 okay, he stopped. And the reality is that if the evidence
10:36 21 isn't in there, it's not in there.

10:36 22 MR. JOHANNINGMEIER: Just to clarify, their expert stopped
10:36 23 a few lines before the code. Not ours. Their expert, in his
10:36 24 analysis, stopped right before the code we cited.

10:36 25 I don't have anything else.

10:36 1 MR. CORDELL: Nothing further.

10:36 2 THE COURT: Well, why don't we take a ten-minute recess?

10:36 3 We'll come back and I'll give you my ruling. And then we'll

10:36 4 move on to the next issue.

10:36 5 THE BAILIFF: All rise.

10:36 6 (Recess taken from 10:36 to 10:44.)

10:44 7 THE BAILIFF: All rise.

10:44 8 THE COURT: Thank you. You may be seated.

10:44 9 The Court is going to overrule Samsung's motion of

10:45 10 noninfringement -- motion for summary judgment of

10:45 11 noninfringement.

10:45 12 The next issue up is -- has to do with 102(g) art. I'll

10:45 13 hear from plaintiff.

10:45 14 MR. JOHANNINGMEIER: You've seen a lot of me early in this

10:45 15 one. Get to hear from some other people later.

10:46 16 All right. We'll start on Slide No. 48.

10:46 17 THE COURT: You can -- I'm pretty familiar with 102(g).

10:46 18 You can skip over --

10:46 19 MR. JOHANNINGMEIER: Yeah. Well, I've only got -- it's

10:46 20 actually really short.

10:46 21 So, Your Honor, as you know, 102(g) is a special category

10:46 22 of art. You have to show invention by another. So in order to

10:46 23 show it, you have to show conception, reduction to practice,

10:46 24 lack of concealment.

10:46 25 Dr. Kiaei's report, on Slide 49, actually recited the

10:46 1 constructive reduction to practice standard, and said that you
10:46 2 had to describe the invention with sufficient detail to enable
10:47 3 a person of skill in the art to practice. That's what you have
10:47 4 to do to show constructive reduction to practice in this
10:47 5 context, and there it is in his report. And the problem is, he
10:47 6 didn't do the analysis.

10:47 7 So on the next slide we just have the deposition
10:47 8 testimony. He didn't do it. He didn't analyze the thing from
10:47 9 the point of view of enablement or conception. But we'll just
10:47 10 focus on this one, because this is the clearest failure.

10:47 11 "I do not have specific analysis of that," he says. "I
10:47 12 may not have explicit, direct analysis of that." And then he
10:47 13 attempts to say that it's in these paragraphs, but on the next
10:47 14 slide, on 52, if you look at it, it's not in those paragraphs.

10:47 15 All that he does in his analysis is he basically
10:47 16 identifies the inventors of some Qualcomm patents and says that
10:47 17 the filing of those patents was constructive reduction to
10:48 18 practice, but he never analyzed those patents for whether or
10:48 19 not they showed conception. He never analyzed those patents
10:48 20 for whether or not they showed enabling disclosure to a person
10:48 21 of ordinary skill in the art.

10:48 22 He just basically relied on his invalidity analysis and
10:48 23 said, well, it discloses -- you know, it basically -- it's --
10:48 24 it makes the invention obvious; therefore, it somehow shows
10:48 25 reduction to practice. But obviousness doesn't that. You have

10:48 1 show every element. You have to show it in the mind of the
10:48 2 inventor. You have to show it enabled for constructive
10:48 3 reduction to practice.

10:48 4 And then on concealment, he basically just pointed to the
10:48 5 same thing, pointed to those patents, not all of which have the
10:48 6 disclosure. In fact, you know, he doesn't -- for certain
10:48 7 claims, he doesn't even say that those patents disclose all the
10:48 8 elements. So he doesn't have lack of concealment either for
10:48 9 those claims. Because the '430 patent, you know, if you -- if
10:48 10 he can't even say it anticipates, then how can he say it
10:49 11 discloses the invention, much less anything else?

10:49 12 So this is all they've got in their brief. I won't
10:49 13 belabor the point because it's fairly simple. He didn't do the
10:49 14 analysis that's required to qualify this as prior art;
10:49 15 therefore, it's not prior art.

10:49 16 They can run the '430 patent at trial if they want.
10:49 17 That's a separate patent. But this [REDACTED] project chip
10:49 18 is not qualified as prior art in this case.

10:49 19 And I'll turn it over to counsel.

10:49 20 MR. CORDELL: Your Honor, Mr. Song will be presenting our
10:49 21 argument.

10:49 22 THE COURT: Okay. I think this is the first time I've had
10:49 23 you in my court, isn't it?

10:49 24 MR. SONG: Yes, Your Honor.

10:49 25 THE COURT: Welcome.

10:49 1 MR. SONG: Thank you very much.

10:49 2 Good morning, Your Honor. So Theta, while acknowledging
10:50 3 that the 102(g) art can be used for obviousness, they argue
10:50 4 that it can't qualify as 102(g) art unless it's anticipatory.
10:50 5 This contradicts itself, and it just makes no sense.

10:50 6 This -- let's look at Theta's arguments here. This is
10:50 7 from the reply brief. First, they say: Once qualified as
10:50 8 prior art, Section 102(g) references can be used in obviousness
10:50 9 analysis.

10:50 10 So they acknowledge that the reference itself does not
10:50 11 have to disclose each element of the claim. They say it can be
10:50 12 used in obviousness analysis.

10:50 13 But then they go on to say, okay. What does it take to
10:50 14 qualify?

10:50 15 Qualification as 102(g) art requires a showing of
10:50 16 conception and constructive reduction to practice. Okay.

10:50 17 Then they say: But the conception cannot be corroborated
10:50 18 and constructive reduction to practice cannot be shown in a
10:51 19 reference that only renders certain elements obvious.

10:51 20 So now they say the reference must show every element. It
10:51 21 must be anticipatory. So this is self-contradictory.

10:51 22 According to Theta, any reference to be used for
10:51 23 obviousness, which they acknowledge that it can be used for
10:51 24 obviousness, must also anticipate the claims. That just makes
10:51 25 no sense, Your Honor.

10:51 1 First of all, I want to -- well, so -- and the -- just
10:51 2 wanted to make sure that the entirety of Theta's argument boils
10:51 3 down to that issue. They incorrectly argue that the
10:51 4 [REDACTED] project used in the obvious analysis for certain
10:51 5 claims cannot qualify as 102(g) art because it does not
10:51 6 anticipate. This makes no sense, and Theta is incorrect on the
10:51 7 law.

10:51 8 So before I get into the correct law, I wanted to point
10:52 9 out that Theta's argument applies to only a subset of the
10:52 10 asserted claims. And those are Claim 8 of the '825 patent and
10:52 11 Claim 1 of the '962 patent.

10:52 12 With regard to the other claims, Dr. Kiaei opined that
10:52 13 they're anticipated by the [REDACTED] project. So even under
10:52 14 Theta's wrong test, [REDACTED] is qualified as 102(g) art for
10:52 15 those other claims.

10:52 16 But, in fact, the [REDACTED] project is 102(g) art for
10:52 17 all claims because Theta is wrong on the law. The Tyco case
10:52 18 from the Federal Circuit lays it out. 102(g) art need not
10:52 19 disclose all elements of the claims when used for obviousness.

10:52 20 In Tyco, the conception and reduction to practice analysis
10:52 21 of the Ethicon Prototype -- it was the 102(g) reference
10:52 22 there -- it did not include all the elements. It was
10:53 23 considered under 103. And because of that, ultimately the
10:53 24 Federal Circuit concluded: The district court improperly held
10:53 25 that the Ethicon Prototype could not be considered prior art

10:53 1 under 103, and erred in finding that the Curved Blade Claims
10:53 2 and Dual Claims would not have been obvious.

10:53 3 So, obviously, the prototype did not include the curve --
10:53 4 all the elements for the Curved Blade Claims or the Dual
10:53 5 Claims.

10:53 6 Theta does not address this clear standard laid out in the
10:53 7 Tyco case. And, in fact, Theta cites no case requiring an
10:53 8 anticipation analysis when a 102(g) (2) reference is used for
10:53 9 obviousness under 103.

10:53 10 Samsung, on the other hand, has cited numerous cases, such
10:53 11 as two seminal Federal Circuit cases, Tyco and Sandt, stating
10:53 12 no special all elements disclosure is required for 102(g) art
10:54 13 to be used for obviousness.

10:54 14 The cases that Theta relies on for this, you know, special
10:54 15 requirement that it must be anticipatory, they all involve two
10:54 16 parties determining the priority of invention.

10:54 17 Who was the first to invent?

10:54 18 So of course an inventor seeking to show priority must
10:54 19 show conception of every element. Similarly, an inventor
10:54 20 swearing back of antedating prior art must also show conception
10:54 21 of all elements.

10:54 22 So these are the examples that Theta cites for their
10:54 23 incorrect assertion that 102(g) art must be anticipatory.

10:54 24 And Section 102(g) itself has two distinct sections
10:54 25 addressing these concepts. 102(g) (1) talks about -- it

10:54 1 addresses an interference proceeding and the priority of
10:54 2 invention; 102(g)(2) is the use of -- use of a reference as a
10:54 3 source of prior art whether for anticipation or obviousness
10:55 4 under Section 103.

10:55 5 So here the --

10:55 6 (Off-the-record discussion.)

10:55 7 MR. SONG: Okay. So here are the cases, Your Honor, that
10:55 8 the -- both parties -- both parties cite. On the left are
10:55 9 those cases where you're addressing the priority of invention.
10:55 10 Theta cites, for example, the Frazer case, right? That was an
10:55 11 interference proceeding. And of course both parties are trying
10:55 12 to show priority of inventorship and all elements or of each
10:55 13 "count," as Theta puts it.

10:55 14 Theta also cites the Burroughs case, where they were
10:56 15 trying to determine whether all the listed inventors did, in
10:56 16 fact, conceive of the invention. So of course they were trying
10:56 17 to determine whether the listed inventors conceived of the
10:56 18 entire invention.

10:56 19 Theta also cites the Round Rock case. So there, they're
10:56 20 trying to antedate -- the inventor was trying to antedate a
10:56 21 prior art reference. Of course he's trying to show all
10:56 22 elements were conceived.

10:56 23 Our case is spelled out in Tyco and Sandt, which is 102(g)
10:56 24 art used for obviousness and prior invention. And in that
10:56 25 instance, that can be combined with other references or a

10:56 1 POSITA's knowledge.

10:56 2 Here are the two cases again.

10:56 3 Tyco: It would have been obvious to one of ordinary skill
10:56 4 to replace a straight blade of the Ethicon Prototype with a
10:56 5 curved blade.

10:56 6 In Sandt: The district court correctly concluded that the
10:56 7 use of threaded studs would have been an obvious substitution
10:56 8 for welding...

10:57 9 The Federal Circuit cases that are actually on point talk
10:57 10 about 102(g) art need not disclose all elements when used under
10:57 11 103.

10:57 12 Now, Theta also complains that Samsung did not prove
10:57 13 evidence on conception and reduction to practice. And, again,
10:57 14 their analysis is incorrect in that they're saying Samsung must
10:57 15 show proof on evidence of conception and reduction to practice
10:57 16 on every element. But 102 -- but Samsung is using -- with
10:57 17 regard to certain claims Samsung is using the 102(g) art to
10:57 18 show obviousness.

10:57 19 And with regard to showing obviousness, Dr. Kiaei provided
10:57 20 11 pages on the background of a Qualcomm [REDACTED] project.
10:57 21 He identifies the timeline all based on documents long before
10:58 22 the priority date of the Theta patents. The technology and the
10:58 23 personnel involved, including numerous individuals that
10:58 24 overlapped between the Qualcomm project and the Qualcomm
10:58 25 patents. He has 92 pages of element-by-element analysis for

10:58 1 the Qualcomm [REDACTED] project which shows conception,
10:58 2 anticipation and obviousness.

10:58 3 And he has further 114 pages element-by-element analysis
10:58 4 of the '430 patent which shows the reduction to practice.

10:58 5 Samsung submits that the '430 patent and '602 patent and the
10:58 6 '279 Qualcomm patents show reduction to practice of the

10:58 7 Qualcomm [REDACTED] project. Dr. Kiaei's report is more than
10:58 8 sufficient to show conception and reduction to practice.

10:58 9 And it doesn't seem like plaintiffs are really focusing on
10:59 10 abandonment, suppression to conceal. But I won't get into
10:59 11 these slides, Your Honor, but of course Qualcomm disclosed this
10:59 12 invention and they did not abandon, suppress or conceal.

10:59 13 With that I'll pass it to plaintiff.

10:59 14 MR. JOHANNINGMEIER: Just briefly, Your Honor.

10:59 15 So counsel cited a bunch of cases about whether or not --
10:59 16 and there are a bunch of cases about whether or not 102(g) art
10:59 17 could be used for obviousness in the ultimate liability
10:59 18 analysis. And we actually don't disagree on that. Those cases
10:59 19 say that it can.

10:59 20 But even the Tyco case, and we pointed this out in our
10:59 21 reply brief at Page 3. In that case the reference was
10:59 22 qualified through a prior showing of -- or a showing of prior
11:00 23 conception and later diligent reduction to practice.

11:00 24 There's a threshold issue with 102(g). You don't get to
11:00 25 use it for anticipation or obviousness if you don't show the

11:00 1 statutory requirements of 102(g) of invention, conception and
11:00 2 reduction to practice. So that's what we are saying is not met
11:00 3 here.

11:00 4 We're not saying that [REDACTED] couldn't be used. The
11:00 5 issue with 102(g) is that it's secret art, right? So no one
11:00 6 knows about it, and that's why the statute has these additional
11:00 7 requirements of conception, reduction to practice and lack of
11:00 8 concealment. And so they haven't done that analysis, most
11:00 9 obviously, with respect to reduction to practice. Because as
11:00 10 counsel said, he never mentioned an enablement analysis. There
11:00 11 is no enablement analysis in the briefs. It's just not there.
11:00 12 And their expert admits it's not there.

11:00 13 So they cannot show, just by saying, well, look, here's a
11:00 14 patent that has, you know, its own invention in it. They can't
11:00 15 show conception and reduction to practice of Dr. Tsividis'
11:00 16 invention by those inventors before in that patent. They
11:01 17 haven't done it.

11:01 18 And so that's the whole beginning and end of this issue.
11:01 19 This art isn't qualified as prior art, so whether or not it can
11:01 20 be used is -- well, it can't be used because it's not qualified
11:01 21 under 102(g).

11:01 22 So thank you, Your Honor.

11:01 23 THE COURT: Court's going to overrule the motion.

11:01 24 I think this would be a good time also -- I may have told
11:01 25 you all this, I can't remember who I have and who I haven't,

11:01 1 but if I haven't explained to you when you're at trial how I
11:01 2 expect you all to put on your experts.

11:01 3 Let's say that, to pick on Mr. Cordell, he has a witness
11:01 4 on the stand, an expert -- this is just experts -- and he draws
11:01 5 an objection that there's something that he's asking that is
11:01 6 outside of the expert report.

11:01 7 I expect in Mr. Cordell's outline for him to have already
11:01 8 put down wherever it is in the report that that is tethered to.
11:01 9 And so I expect the lawyer who's on direct to say, Judge, it
11:02 10 is. It's on Page 32 in Paragraph X.

11:02 11 Now, it doesn't, you know, verbatim. I'm just saying, you
11:02 12 have to be able to persuade me that you have disclosed to the
11:02 13 other side what you're asking in the report or it was clear
11:02 14 from the report that's what he was going to be asked.

11:02 15 The only problem we get into is, you all are really good
11:02 16 lawyers, which means on cross you're going to do a good job on
11:02 17 cross, which means occasionally there's something an expert has
11:02 18 to get into on redirect that may or may not be in his direct to
11:02 19 deal with something that was unanticipated that was brought up
11:02 20 on cross.

11:02 21 I'm more flexible on what an expert says on redirect if I
11:02 22 am persuaded by a lawyer that it was something that the expert
11:02 23 is responding to rather than giving an affirmative opinion to.

11:03 24 And so that's, generally speaking, the way I handle when
11:03 25 experts are on the witness stand, is I want the person who

11:03 1 asked the questions to very quickly be able to tell me in good
11:03 2 faith where it is in the report so we can keep going quickly.

11:03 3 And also, it -- after one or two times, it discourages the
11:03 4 other side from making those objections.

11:03 5 The next issue we have up is the motions. I think we can
11:03 6 take up both no direct infringement and no willfulness at the
11:03 7 same time, or we can do them one at a time, whichever Samsung's
11:03 8 counsel think -- I think I can follow both arguments. But if
11:03 9 you'd rather do them one at a time, that's fine too.

11:03 10 MR. CORDELL: And, Your Honor, these are arguments that
11:03 11 Dr. Albert is handling. He's our remote lawyer.

11:03 12 THE COURT: Is he available remotely?

11:03 13 MR. ALBERT: I am, Your Honor.

11:03 14 THE COURT: I'm happy to hear -- let me just -- if you'll
11:03 15 introduce yourself, I just want to make sure my court reporter
11:04 16 can hear you and we can make sure we can transcribe.

11:04 17 So if you'd introduce yourself, let me make sure Kristie
11:04 18 can hear you and then you can go ahead and proceed with your
11:04 19 argument.

11:04 20 MR. ALBERT: Good morning.

11:04 21 (Off-the-record discussion.)

11:04 22 THE COURT: So let's do this. We can hopefully get that
11:04 23 addressed at lunch. Why don't we skip over this issue, we'll
11:04 24 get it -- we're going to do what we can to get this fixed over
11:04 25 lunch so that Kristie can hear it better. And so let's move on

11:04 1 then to -- we have an hour.

11:04 2 So let's take up the issue of the certificate of
11:04 3 correction.

11:04 4 MR. CORDELL: And for us that'll be Mr. Song again.

11:04 5 THE COURT: Okay. Very good.

11:06 6 I'm -- we're -- I've been pretty fully briefed on this. I
11:06 7 think I can jump to the plaintiff first and have -- I
11:06 8 understand your argument, and I'm certainly going to give you a
11:07 9 chance to respond after I hear them, but I have a pretty good
11:07 10 idea of what you're going to say. And to save a little time,
11:07 11 let me start with the plaintiff and do it that way.

11:07 12 MR. SONG: Very well, Your Honor.

11:07 13 THE COURT: Thank you.

11:07 14 MR. JOHANNINGMEIER: You skipped the one that wasn't me.
11:07 15 So it's me again.

11:07 16 THE COURT: Well, not to put too fine a point on this, but
11:07 17 it's probably not a great thing for you that I'm asking you to
11:07 18 go first.

11:07 19 MR. JOHANNINGMEIER: I understand. I understand.

11:07 20 THE COURT: And I want to take up -- I don't want to take
11:07 21 up the damage. I want to take up whether or not the -- it was
11:07 22 the -- it was correctable, and then what happens with the
11:08 23 damages will flow from that. I don't want to hear about the
11:08 24 damages first.

11:08 25 MR. JOHANNINGMEIER: Right. Right. Yes, Your Honor.

11:08 1 So the question here is -- can we just go to the next
11:08 2 slide?

11:08 3 So we have the brief on no damages. We have our brief on
11:08 4 judicial correction, which would moot theirs by making it
11:08 5 retroactive. The question is: The Court, you know, can
11:08 6 correct this if it's evident from the face of the patent, but
11:08 7 that's ultimately the question on both the -- you know, the
11:08 8 propriety of the correction and the judicial correction.

11:08 9 So the unamended claim contradicts itself and the
11:08 10 specification. In the specification, in every discussion, in
11:08 11 all of these figures it talks about the bias current being
11:08 12 lowered and reduced, and the uncorrected claim said that it was
11:08 13 increased.

11:08 14 So simply looking -- a person of ordinary skill looking at
11:09 15 that thing would say, you know, would the testimony reveal --
11:09 16 it wouldn't be consistent on the terms of the claim itself
11:09 17 because it doesn't make sense. It says that you want to -- it
11:09 18 basically describes a situation where you want to reduce the
11:09 19 bias current, but the claim said to increase it. Basically it
11:09 20 said use more power when you're in the best -- in the good
11:09 21 condition.

11:09 22 And that doesn't make any sense to a person of ordinary
11:09 23 skill reading this, as the testimony from everybody suggested.
11:09 24 But then if that person of ordinary skill was to read the
11:09 25 specification, they would find all of the references to mean

11:09 1 that it was lowered. So they would understand that the
11:09 2 claim -- the patent actually was teaching that it should be
11:09 3 lowered in that circumstance.

11:09 4 Now, there's a lot of discussion in the briefing about
11:09 5 whether or not this kind of thing is correctable. And we have
11:10 6 a case showing minor corrections that are correctable. We've
11:10 7 had -- put in cases showing things where the -- where stuff was
11:10 8 corrected from the opposite to itself.

11:10 9 And the bottom line is that the cases say that if the --
11:10 10 well, they say that if it was evident from the face of the
11:10 11 patent, the Court can correct it. But in terms of correction,
11:10 12 the cases say that when you're conforming -- when you're making
11:10 13 a correction that simply conforms the claim to what the
11:10 14 specification says that that's not a broadening correction.
11:10 15 And those -- you know, there's multiple examples of that in our
11:10 16 brief, including ones that are about minor corrections.

11:10 17 So the --

11:10 18 THE COURT: Help me out. I didn't understand this -- the
11:10 19 argument that this was broadening. I think the defendant's
11:10 20 concern is that this would be rewriting the patent. I don't --
11:11 21 am I wrong about that from Samsung's perspective?

11:11 22 MR. SONG: Yes, Your Honor. I mean, they are essentially
11:11 23 rewriting the patent. Case law says broaden. But any change
11:11 24 that covers things that didn't cover before, that, by
11:11 25 definition, is broadening.

11:11 1 THE COURT: Got it. In that sense, but, yeah. We're
11:11 2 saying the same thing. I got it.

11:11 3 MR. JOHANNINGMEIER: Well, but we -- I mean, we disagree
11:11 4 with that -- with what Mr. Song just said, that any change that
11:11 5 changes the scope would be broadening. That -- if that was the
11:11 6 rule, there could never be a correction. Someone would argue
11:11 7 that it changes the scope.

11:11 8 So the cases we laid out in our brief show changes that --
11:11 9 changing things from plus or minus in a formula, things like
11:11 10 that that do change the scope. And yet they're valid
11:11 11 corrections, right? And the cases say, well, that's because
11:11 12 the -- you're conforming -- you're not changing the scope.
11:11 13 You're conforming the scope to what was intended, to what's
11:11 14 disclosed, to what a person of ordinary skill would understand.

11:12 15 So in the situation where a person of ordinary skill would
11:12 16 look at this and say, whoa, that can't be right, and look at
11:12 17 the patent and say, that's not right. Then you are not
11:12 18 changing the scope of the claim from what a person of ordinary
11:12 19 skill would understand. You're just conforming it to what they
11:12 20 would understand.

11:12 21 And there's multiple cases that say that, including ones
11:12 22 after the -- that they rely on. I believe the -- well, if I
11:12 23 can pull up -- I don't have the brief in front of me, but
11:12 24 they're all in our brief.

11:12 25 So that fundamentally is the dispute, is whether or not

11:12 1 you can make a change that corrects the patent to what a person
11:12 2 of ordinary skill would understand. And then, you know, is
11:12 3 that changing the scope? Well, no, because -- it's not
11:12 4 changing the scope. Because the scope is what a person of
11:12 5 ordinary skill would understand. If they understand it's
11:12 6 broken, then you're not changing the scope by making the
11:12 7 correction.

11:12 8 And so there's multiple opinions laying that out,
11:13 9 including with respect to minor corrections as opposed to just
11:13 10 typos. And then, you know, so those are in our brief and we
11:13 11 believe that this is proper based on that.

11:13 12 We think this is a perfect example of one where, you know,
11:13 13 the claim says save power by increasing the power. It doesn't
11:13 14 make sense. So a person reading that would be like --
11:13 15 would look to the spec and see lowered, reduced, reduced. They
11:13 16 would understand that what was taught in the specification
11:13 17 wasn't captured in the claims. And they would understand that
11:13 18 this was what was intended.

11:13 19 And in that situation there's plenty of authority for
11:13 20 corrections being proper. And if Your Honor believes that the
11:13 21 error is -- would be evident, then there's also authority for
11:13 22 correcting -- judicially correcting the claims to just make
11:13 23 that -- basically do what the PTO did. I mean, the PTO looked
11:13 24 at this. They issued a correction. Corrections are presumed
11:14 25 valid. All of that we have in our briefs as well.

11:14 1 What we're asking the Court to do is to correct the claim
11:14 2 consistent with what the PTO did. And the reason for that is
11:14 3 very obvious from the brief, because it makes the damages
11:14 4 retroactive.

11:14 5 But the important thing here is that there are cases that
11:14 6 lay it out. You can correct this when you're just conforming
11:14 7 the claim to what's disclosed to a person of ordinary skill and
11:14 8 what a person of ordinary skill would understand.

11:14 9 So I think that's it in a nutshell, Your Honor.

11:14 10 THE COURT: Got it. Give me a second.

11:14 11 (Off-the-record bench conference.)

11:16 12 THE COURT: So the Court finds that the certificate of
11:17 13 correction is invalid. The Court is not going to judicially
11:17 14 correct it. It's going to deny the motion for judicial
11:17 15 correction.

11:17 16 Now, what I don't know is what that does to the
11:17 17 plaintiff's case because the plaintiff has a patent that was
11:17 18 extant before the correction, but I'm assuming the plaintiff
11:17 19 would not be asserting that patent with that claim in it
11:17 20 against the defendant. But I'm not sure.

11:17 21 So I know I sound ignorant, but I'm just -- I'm not sure
11:17 22 what -- I'm not sure what to do with that -- what we're going
11:17 23 to do with that patent in this trial, given what I've done with
11:17 24 regard to the certificate of correction and the issue of
11:17 25 correction.

11:17 1 MR. CORDELL: So I don't think the plaintiff has asserted
11:17 2 the uncorrected version at all.

11:18 3 MR. SONG: Your Honor, the uncorrected claim they've, in
11:18 4 fact, said that it's nonsensical. It's against Ohm's law.
11:18 5 They have not asserted any opinions on it. So there's nothing
11:18 6 in the record on the uncorrect one.

11:18 7 MR. JOHANNINGMEIER: Your Honor, just briefly, the
11:18 8 situation is that if the damages -- we've basically conceded
11:18 9 that the damages would not be retroactive. So it would be from
11:18 10 the point of view of the correction, which makes this no longer
11:18 11 the first patent in the case.

11:18 12 It is asserted forward from the correction, but we
11:18 13 obviously need to discuss and decide what we're going to do
11:18 14 with respect to whether or not we're going to run with it at
11:18 15 trial.

11:18 16 MR. CORDELL: I believe, as a legal matter, Your Honor,
11:18 17 your finding that the correction is invalid invalidates the
11:18 18 patent. So I don't think there is a take --

11:18 19 THE COURT: That, I don't know. But if that's true,
11:18 20 then -- I don't remember that in the briefing, that my finding
11:18 21 invalidates the patent, and I guess that's where I'm showing my
11:18 22 ignorance, is I know what I've done. I understand what I've
11:19 23 done in terms of I don't believe the Patent Office was correct
11:19 24 and I don't believe it should have been corrected, but I don't
11:19 25 know the law on the impact on a patent that has improperly been

11:19 1 corrected.

11:19 2 MR. BLACK: The answer is, Your Honor, the uncorrected
11:19 3 patent might have been assertable. However --

11:19 4 THE COURT: That was what makes sense to me.

11:19 5 MR. BLACK: First of all, they did not present an
11:19 6 infringement case based on the uncorrected patent; and second
11:19 7 of all, they've stated repeatedly, as a matter of law, judicial
11:19 8 estoppel at this point actually, that there's no support in the
11:19 9 original specification for the uncorrected claim. They went so
11:19 10 far as to say it violated Ohm's law.

11:19 11 So there can be nothing in this case from an infringement
11:19 12 perspective because they don't have a report on the uncorrected
11:19 13 analysis; and if they did, it would be invalid under
11:19 14 Section 112 because there's no support for the claims.

11:19 15 So the patent is out of the case. It's not a matter of
11:19 16 whether or not the infringement date, the start date, the '962
11:20 17 is out, which will have other ramifications for the rest of the
11:20 18 day.

11:20 19 THE COURT: That is what makes sense to me.

11:20 20 MS. DE MORY: Yeah. I don't think -- I mean, we didn't
11:20 21 assert the uncorrected patent, and I believe Your Honor is
11:20 22 finding the patent to be invalid essentially by the
11:20 23 correction --

11:20 24 THE COURT: I'm finding the correction to be invalid. But
11:20 25 not having dealt with this before, I don't know -- and I should

11:20 1 have thought of this before I came out here. I just don't know
11:20 2 if that means that the patent is invalid and can't -- and I
11:20 3 understand what Mr. Black is saying, which -- and it makes
11:20 4 eminently good sense to me, especially given what the plaintiff
11:20 5 had to do to attempt to get it corrected, which is to say it
11:20 6 only makes sense -- it is -- the proof of it needing to be
11:20 7 corrected is what's in the specification doesn't...

11:20 8 So I'm going to invalidate the patent --

11:20 9 MR. BLACK: Thank you, Your Honor.

11:20 10 THE COURT: -- which I guess is the cleanest way to do it.
11:20 11 And then it's Samsung's problem if I'm wrong, but I think
11:21 12 that's -- I think it's the right thing to do, based on my
11:21 13 decision, is to formally -- not ask the plaintiff to withdraw
11:21 14 it and deal with a failure to do an expert report and all that
11:21 15 stuff.

11:21 16 I'm just going to find as a matter of law it's invalid
11:21 17 based on my decision with regard to the correction, and that's
11:21 18 what the plaintiff can take up if they think I'm wrong.

11:21 19 MR. CORDELL: Thank you, Your Honor.

11:21 20 MS. DE MORY: Thank you, Your Honor.

11:21 21 THE COURT: Okay. So next we have a Daubert regarding --
11:21 22 is it Dr. Steckel?

11:21 23 MR. HAND: Yes, Your Honor.

11:21 24 THE COURT: Okay. I'm happy to take that up.

11:21 25 MR. CORDELL: Your Honor, Mike McKeon will handle that for

11:21 1 Samsung.

11:21 2 MR. HAND: Aaron Hand for the plaintiff, Your Honor.

11:21 3 THE COURT: Yes, sir.

11:21 4 MR. HAND: I will do my best to keep this brief.

11:21 5 Incredibly in this case, Dr. Steckel admitted in his deposition

11:22 6 that he had not deciphered the very analysis that he was hired

11:22 7 to rebut before the report bearing his name was tendered. He

11:22 8 didn't figure out until Samsung's counsel told him on redirect

11:22 9 what had happened in the report that he himself was supposed to

11:22 10 have analyzed. Therefore, the opinions that are expressed in

11:22 11 Dr. Steckel's report are not reliable, and there's no way they

11:22 12 can possibly be tied to the specific facts of this case.

11:22 13 This goes beyond something that's a mere cross point, this

11:22 14 is a methodological failure on the part of Dr. Steckel.

11:22 15 Because having not actually understood or analyzed or read or

11:22 16 deciphered the report that he was supposed to rebut, there's no

11:22 17 way that what the words that are in his rebuttal report are any

11:22 18 way tied to the facts of this case, the facts of Dr. Prince's

11:22 19 report, the facts that he was hired to rebut.

11:22 20 And it goes beyond that, because the report that he

11:23 21 tendered is really nothing more than a generic recitation of

11:23 22 articles that are not actually tied to what happened in this

11:23 23 case. And he did nothing himself to go beyond generic to

11:23 24 actually look at any facts in this case. He didn't talk to a

11:23 25 single Samsung person. He didn't talk to a single one of

11:23 1 Samsung's other experts. He didn't look at a single deposition
11:23 2 transcript. He didn't look at any rog responses. He didn't
11:23 3 interview anybody in the industry. He didn't conduct any focus
11:23 4 groups. He didn't review any production documents of his own.

11:23 5 And this is a list of things that one of his footnotes
11:23 6 says is all things that you should be doing if you're trying to
11:23 7 assess whether or not a survey is valid or whether or not a
11:23 8 survey looked at the right factors.

11:23 9 So exclusion under Daubert is warranted here. There's
11:23 10 simply too great of an analytical gap between the data that he
11:24 11 didn't look at and he didn't analyze and the opinions that are
11:24 12 in his report. And that comes from the GE versus Joyner case
11:24 13 from the Supreme Court. I'll keep it simple.

11:24 14 THE COURT: Mr. McKeon? Welcome. I haven't seen you in
11:24 15 over a decade. Good to see you.

11:24 16 MR. MCKEON: Good morning, Your Honor. It's a pleasure to
11:24 17 appear before you. It really is.

11:24 18 So if I can get the slides up here, please. All right.

11:24 19 Well, so good morning, Your Honor. So the issue here is
11:24 20 Dr. Steckel, really the basis of his opinions, of course, are
11:24 21 in his report. And what we know about Dr. Steckel is that he
11:24 22 really is a premier expert on the issue of surveys and conjoint
11:24 23 analysis. And, in fact, he has over 40 years of survey
11:24 24 experience and conjoint analysis. And that's the primary
11:25 25 opinion he offers in his report, is critiquing the conjoint

11:25 1 survey that their expert, Dr. Prince, put on.

11:25 2 And the basis, really, of their motion papers and the
11:25 3 argument I heard this morning really is, there was an issue
11:25 4 about his experience related to economics. Because what you're
11:25 5 going to hear with respect to Dr. Prince's challenge that we
11:25 6 have in our motion papers is that he takes the survey and then
11:25 7 he does a second step and does a microeconomic analysis. And
11:25 8 we have a big problem with his two-step process.

11:25 9 The bulk of the report that Dr. Steckel put in related to
11:25 10 the survey. And he also, as part of that analysis, made some
11:25 11 observations about the microeconomic analysis. But that was
11:25 12 secondary to his main focus which is survey. And certainly he
11:25 13 has experience in survey and they don't really, I think, in any
11:26 14 meaningful way, counter that.

11:26 15 And even with respect to economics, he has a degree from
11:26 16 Wharton School, an M.B.A., that deals with economics as well.
11:26 17 So his experience is there.

11:26 18 But let me talk about the deposition testimony that they
11:26 19 cited, and that seems to be the focus of their argument this
11:26 20 morning.

11:26 21 During the report -- in the report process, we have on the
11:26 22 right an excerpt from his report. He commented on an excerpt
11:26 23 from Dr. Prince's report.

11:26 24 And this is, on the left, is from Dr. Prince. And
11:26 25 Dr. Prince makes his observation that based on this willingness

11:26 1 to pay, which is the result of the survey, consumers are going
11:26 2 to pay \$4.74 more per unit. And then he takes that and tries
11:26 3 to create a -- he calls it an equilibrium price, which is
11:26 4 market price that a consumer would pay for this additional
11:26 5 20 minutes of battery life on an already existing 13-hour
11:27 6 battery. And he says that price is going to be \$2.37.

11:27 7 Then he goes on and does this micro -- further
11:27 8 microeconomic analysis and concludes that the profit that
11:27 9 Samsung would make per unit, based on the \$2.37 additional
11:27 10 price, is \$4.72.

11:27 11 And that's the head-scratcher. Because, well, wait a
11:27 12 minute. The price is only going up -- the same phone,
11:27 13 nothing's changed, and the price is only going up \$2.37, but
11:27 14 yet Samsung's going to have the profit go up to \$4.72.

11:27 15 And in his report, that's all he mentions, you know, on
11:27 16 the right. He goes, well, that's kind of a head-scratcher,
11:27 17 doesn't make sense to me.

11:27 18 And that was the point he made. And then in deposition,
11:27 19 they went on further about, well, what about Prince's analysis
11:27 20 and the \$4.72, do you know how he would calculated it?

11:27 21 That wasn't the focus of his critique. He was just making
11:27 22 the high-level point that it doesn't make sense where you're
11:28 23 going to have -- the costs are the same, the same product and
11:28 24 also your profits are almost going to double for the \$2.37
11:28 25 price increase.

11:28 1 That was the point he was making in his report. And in
11:28 2 the deposition, they went off on, what's the basis for
11:28 3 Dr. Prince's analysis? He wasn't going into that, and that was
11:28 4 the excerpt and the confusion in the deposition.

11:28 5 But what he did do -- and it's the core of his report and
11:28 6 what he -- he's going to testify at trial, will be his trial
11:28 7 testimony is the problems with the survey.

11:28 8 And Dr. Prince's survey is really problematic, Your Honor.
11:28 9 And I won't go into the details of his numbers, but there's two
11:28 10 ways to look internal validity of a survey and a conjoint
11:28 11 survey.

11:28 12 And, you know, hit rate is how well the model of the
11:28 13 survey, how well that predicts a given respondent's result.

11:29 14 And the literature says, oh, you've got to be 70, 80 percent.
11:29 15 At the time, it should predict it. And the hit rate here that
11:29 16 was calculated by Dr. Steckel was 44 percent.

11:29 17 And U-Squared is how well that the data fits the model.
11:29 18 One is random -- I'm sorry. Zero's random. One is perfect
11:29 19 fit.

11:29 20 This survey by Dr. Prince is close to random. And this
11:29 21 analysis is laid out in the report. That is the bulk of his
11:29 22 opinion that's going to be at trial? And this is Steckel's
11:29 23 bailiwick. This is his area. And this is the basis of his
11:29 24 opinion.

11:29 25 And there's other things they didn't mention this morning,

11:29 1 so I won't go into it, Your Honor. But in their briefing they
11:29 2 go off about some of the survey issues. We've got responses to
11:29 3 all those. I'm not going to go through it this morning. But
11:29 4 just to say that when it comes to the conjoint survey,
11:29 5 Dr. Steckel is, you know, is a conjoint survey stud, if I may,
11:29 6 and the microeconomic analysis that he's done in responding to
11:30 7 Dr. Prince, very narrow and certainly consistent with the case
11:30 8 law.

11:30 9 And the Fifth Circuit that says, areas adjacent -- and we
11:30 10 cite the case here from the Fifth Circuit on Slide 2 -- areas
11:30 11 adjacent to the core expertise of an expert are fine. And we
11:30 12 have the Abbott case from Delaware we cite that even actually,
11:30 13 ironically, quotes, an expert in the area of marketing, they're
11:30 14 certainly able to testify related areas such as economics.

11:30 15 And that's from Judge Jordan who was on the bench at the
11:30 16 time in Delaware.

11:30 17 So unless there's any questions, Your Honor, that's the
11:30 18 only response I have.

11:30 19 THE COURT: A response?

11:30 20 MR. MCKEON: Thank you.

11:30 21 THE COURT: You're welcome.

11:30 22 MR. HAND: Yes. Briefly, Your Honor.

11:30 23 We're talking about an expert that was hired exactly two
11:30 24 weeks before he tendered his report. And although counsel
11:31 25 wants to say that this was just some sort of observatory

11:31 1 remark, that something didn't seem to make sense that you had a
11:31 2 \$2 number, that how could that possibly -- how could you have a
11:31 3 \$4 number higher than this \$2 number?

11:31 4 The problem is that Dr. Steckel, in that concluding
11:31 5 paragraph, demonstrates that he really didn't understand the
11:31 6 analysis that Prince did. And what's even more problematic,
11:31 7 Your Honor, is he didn't understand the whole purpose for which
11:31 8 the survey was being used.

11:31 9 He didn't understand -- Dr. Steckel did not take the time
11:31 10 or didn't understand that the survey was being used and
11:31 11 designed for an intended purpose. And that intended purpose
11:31 12 was being fed into this economic model, and that there was an
11:31 13 analysis that came around it. He didn't understand any of
11:31 14 that.

11:31 15 Whether it's because he didn't have the understanding or
11:31 16 the background or whether it's because he didn't take the time
11:31 17 to do it, his report and the deposition demonstrate that he did
11:32 18 not do the work that was necessary to be done in order to tie
11:32 19 his opinions to this case and render an opinion that is in line
11:32 20 with Rule 702. And his opinion should be excluded.

11:32 21 Thank you, Your Honor.

11:32 22 THE COURT: You're welcome. I'm going to overrule the
11:32 23 Daubert motion.

11:32 24 The next motion we have up is Samsung's Daubert to
11:32 25 exclude -- is it Dr. Prince?

11:32 1 MR. MCKEON: All right. Well, let's -- if I can get the
11:32 2 slides up here. Okay. Well, let me just start, Your Honor, as
11:33 3 I -- while the slides are being pulled up here.

11:33 4 As I indicated earlier, Dr. Prince, the analysis that he
11:33 5 undertook was a two-step analysis. Do the survey, his conjoint
11:33 6 survey. And the goal of the survey -- it's got one goal -- is
11:33 7 to get what's referred to as a willingness to pay. What are
11:33 8 consumers willing to pay, based on the survey, for an
11:33 9 additional 20 minutes of battery life over the 13 hours already
11:33 10 in the battery? And he does the survey and he gets to \$4.74.

11:33 11 Then he takes the second step. And he refers to it as the
11:33 12 microeconomic analysis. And the goal here -- he needs to do
11:33 13 this because he needs to get an actual market price driven by
11:33 14 supply/demand concepts. And what he does is he gets to \$2.37.
11:34 15 And from there gets a profit, an equilibrium profit of \$4.72.

11:34 16 So what's the problem here? The problem is, Your Honor,
11:34 17 under Daubert, as we all know Daubert is very precise what you
11:34 18 need to do here. First of all you're going to offer a theory
11:34 19 and present it to a jury, it's got to be generally accepted in
11:34 20 the scientific community. We all know that.

11:34 21 And then moreover, you've got to demonstrate that it's
11:34 22 peer-reviewed, this theory, and there's publications. If it's
11:34 23 some kind of new far-flung theory, we better demonstrate that
11:34 24 others out there in your community have written about it,
11:34 25 peer-reviewed about it and approve of it.

11:34 1 And, finally, if there's any potential error rate or an
11:34 2 error rate that you can demonstrate in the analysis that's
11:34 3 unacceptable, then that needs to be considered in your job as a
11:34 4 gatekeeper here. And he just utterly fails at this. And why
11:35 5 is this?

11:35 6 It's because there's nothing out there in the scientific
11:35 7 community, Your Honor, where you combine the conjoint survey
11:35 8 and then take the additional step of doing a microeconomic
11:35 9 analysis to get at what he refers to as an equilibrium price,
11:35 10 and that's the fundamental problem.

11:35 11 And let me just comment quickly on the survey. This is an
11:35 12 example, Your Honor, of one of the questions that a respondent
11:35 13 is asked. It's on the slide here. You pick four potential
11:35 14 phones, and these are all random phones with the brand for
11:35 15 Samsung, LG, Apple, Motorola; a selection in the battery life,
11:35 16 which is notable, it's 6 hours, 12 hours, 24 hours, 18 hours.

11:35 17 And remember, Your Honor, we're talking about willingness
11:35 18 to pay for 20 minutes, and yet he has these really unrelated
11:35 19 segments of hours.

11:35 20 And then really for this motion fundamentally the problem
11:36 21 is, there is no choice of none of the above. So the
11:36 22 respondents have to pick one of these four. You can't --
11:36 23 there's no choice just to opt out of this. You've got to pick
11:36 24 one. And that's a problem.

11:36 25 And then let's talk about the microeconomic analysis. He

11:36 1 takes that and goes into the microeconomic analysis we see here
11:36 2 in which he creates a demand curve, a demand curve, and he
11:36 3 adjusts it down based on willing to pay values and he generates
11:36 4 the numbers that we've talked about.

11:36 5 And there's nothing in the literature, Your Honor. We
11:36 6 asked them to identify it. In their motion papers, they simply
11:36 7 don't do it. The best they come to is the Allenby, which we
11:36 8 have here on the slide in the left, and the Allenby paper is
11:36 9 very specific.

11:36 10 I'll quote from it: While demand parameters can, in
11:36 11 principle, be measured from a conjoint study conducted without
11:37 12 the outside option -- "outside option" here means without the
11:37 13 none of the above -- valid equilibrium calculations do require
11:37 14 an outside alternative.

11:37 15 What does that mean?

11:37 16 Equilibrium price. If your goal is to do this analysis --
11:37 17 to use a conjoint survey to get to the equilibrium price, you
11:37 18 have to have the outside alternative, which is the none of the
11:37 19 above. So even the best they do is the Allenby paper. That
11:37 20 paper itself demonstrates, if you're going to do this, you've
11:37 21 got to have none of the above.

11:37 22 And, Your Honor, it's really intuitive. Because if I have
11:37 23 a phone -- and we have an example in our brief that they
11:37 24 criticize, but I think it demonstrates the point. If I have a
11:37 25 phone that's, you know, \$1 million for 6 hours of battery life

11:37 1 and \$2 million for 12 hours of battery life, well -- and I
11:38 2 can't -- the survey says the respondent can't say none, well,
11:38 3 any result I get from that survey is garbage on its face
11:38 4 because of course no one's going to buy that. And that's
11:38 5 really the point here.

11:38 6 And we went through the brief, Your Honor. And as far as
11:38 7 we can tell, the sources they cite for this proposition that I
11:38 8 can combine the conjoint survey and the microeconomic analysis
11:38 9 to get to the equilibrium price -- we have it on the slide --
11:38 10 the paper we cite -- that they cite deals with market shares,
11:38 11 not equilibrium price. They cite testimony from Professor
11:38 12 Hauser from the Apple/Samsung case. You know, query whether
11:38 13 that's a valid, you know, consideration in Daubert. But
11:38 14 nevertheless, it didn't deal with equilibrium price changes
11:38 15 which is really the key here.

11:38 16 And the other sources are from Dr. -- from Dr. Prince, the
11:38 17 focus group, of course, you know, is not a signal of generally
11:39 18 accepted principles and not a peer-reviewed publication. And
11:39 19 they did offer the Apple/Qualcomm, though he didn't really give
11:39 20 us any evidence in what he was saying there.

11:39 21 And then finally, Your Honor, so that's the problem -- the
11:39 22 Daubert problem with not generally accepted in the scientific
11:39 23 community, not peer-reviewed. Hopefully when they come up
11:39 24 here, they can show you, but we haven't seen it yet.

11:39 25 Then the third problem is the error rate. And I touched

11:39 1 upon this earlier and I won't belabor the point, but the error
11:39 2 rates that are in evidence in this case in terms of what we're
11:39 3 going to present to the jury if this goes forward, right here,
11:39 4 a 44 percent hit rate, that's -- you're batting, that's an F.
11:39 5 Because you got to get 70 to 80 percent, the literature tells
11:39 6 you, 55 percent of the time the survey is predicting in the
11:39 7 wrong result. And the data -- the U-squared tells you it's
11:40 8 close to random.

11:40 9 And this is an internal validity study. Now, there was
11:40 10 the survey itself from an internal design is problematic. Now,
11:40 11 in the brief they go off about external design, and we have a
11:40 12 problem with what Dr. Prince did there. But external design is
11:40 13 basically saying can I use the results of the survey and apply
11:40 14 it to the broader population that I'm looking at? And okay.
11:40 15 That's -- you got to have external validity.

11:40 16 But if you don't have internal validity, in other words,
11:40 17 my survey's garbage, whether you have external validity is
11:40 18 irrelevant. And that's the point we're making. And so
11:40 19 external validity is really beside the point. They don't have
11:40 20 internal validity.

11:40 21 And when we asked Dr. Prince in his deposition about, do
11:40 22 you have any response to this? He did not. With respect to
11:41 23 the error rates that we've cited, Dr. Prince has no response to
11:41 24 that. And so this is all we have on this, is that we have a
11:41 25 study where the error rates are an F. They just don't pass

11:41 1 muster. And we don't believe that they pass Daubert, Your
11:41 2 Honor.

11:41 3 And with that, Your Honor, we believe that you should
11:41 4 grant our Daubert motion. If there's any questions --

11:41 5 THE COURT: No, sir.

11:41 6 Response?

11:41 7 MS. DE MORY: Good morning, Your Honor.

11:41 8 THE COURT: Good morning.

11:41 9 MS. DE MORY: Denise De Mory for plaintiff Theta IP.

11:41 10 If you can switch to the next slide.

11:41 11 So this Daubert motion is a classic non-Daubert motion.

11:42 12 This is a --

11:42 13 Can I get the next slide?

11:42 14 Disagreement is not a basis for a Daubert. So we just
11:42 15 heard a number of things about the "none of the above" option
11:42 16 and how it must be an option. Otherwise, this study does not
11:42 17 qualify as you cannot do the second step which is the economic
11:42 18 analysis.

11:42 19 And initially I want to start with that, which is this
11:42 20 notion that there is no ability to do both the survey and the
11:42 21 economic analysis. Really what normally happens is, because
11:42 22 Dr. Steckel is not an economic expert, which is why he didn't
11:42 23 understand the economic analysis. Normally he does the
11:42 24 conjoint survey and he passes it to, for example, Dr. Ugone,
11:42 25 who does the economic analysis.

11:42 1 But in this case Theta hired Dr. Prince who just stepped
11:42 2 down as the chief economist of the FCC. He is a Ph.D.
11:43 3 economics expert. He is also a survey expert. And so we just
11:43 4 happened to have the same person in one person. One expert.
11:43 5 And to suggest that there's no peer-reviewed authority for him
11:43 6 doing the microeconomic analysis that he did, this -- I happen
11:43 7 to have the ninth edition of his textbook here, but it's --
11:43 8 he's on the tenth. And the microeconomic analysis that he did,
11:43 9 the pictures which we're going to look at later in the Bergman
11:43 10 report for damages. But you'll see this slide later. The
11:43 11 analysis is in his textbook which is now in the tenth edition.

11:43 12 So that notion is just wrong from the perspective that you
11:43 13 can't do this two-part analysis, that it is nowhere supported.
11:43 14 It is just normally not found. These two skills are normally
11:43 15 not found in the same expert.

11:43 16 Now, in terms of the "none of the above" option, I just
11:44 17 heard opposing counsel talk about how there's nothing in our
11:44 18 papers or in the Prince report, other than this Allenby
11:44 19 article. Now, the first thing is the Allenby article itself
11:44 20 is -- doesn't -- says something beyond what counsel quoted on
11:44 21 his slide. And it says, whether or not the outside option is
11:44 22 included depends on the ultimate use of the conjoint survey.
11:44 23 Clearly it's possible to measure how respondents trade off
11:44 24 different product attributes against each other without
11:44 25 inclusion of an outside example -- outside option. For

11:44 1 example, it is possible to estimate price coefficient in a
11:44 2 conjoint survey which does not include the outside option.

11:44 3 In addition to that, we go on -- and that's a 2014
11:44 4 paper -- we go on and discuss, and Dr. Prince cites in his
11:44 5 report, a 2019 paper which discusses all the reasons why it is
11:45 6 not appropriate to make a reasoned decision by the person who's
11:45 7 conducting the study of whether or not you should include a
11:45 8 "none of the above" option.

11:45 9 And it gives a number -- three reasons why you should and
11:45 10 should not include it. And it goes on to say, you know, it may
11:45 11 actually bias the results in a way that you don't want them to
11:45 12 bias them.

11:45 13 So you do an analysis, which Dr. Prince did, and you make
11:45 14 a reasoned decision about whether or not the "none of the
11:45 15 above" option should be there. And so there are, in fact, not
11:45 16 just one but two peer-reviewed papers that are cited in the
11:45 17 Prince report and are cited in our opposition. And this is
11:45 18 really a classic disagreement between experts as to whether or
11:45 19 not the conjoint survey that was conducted should have included
11:45 20 a "none of the above" option.

11:45 21 So that is the "none of the above" option.

11:45 22 And then in terms of the internal and external validity --
11:45 23 We can go to the next slide.

11:45 24 -- it's the same debate. So I recall when we were talking
11:46 25 about the Steckel Daubert a minute ago, counsel actually said

11:46 1 there are actually two different ways to validate a survey.

11:46 2 One is external, and one is internal.

11:46 3 And that's the way he started the discussion with regard
11:46 4 to Steckel, and then he said Steckel criticizes this internal
11:46 5 validity.

11:46 6 There is no hard and fast rule that both forms of checks
11:46 7 need to be performed. In our papers and in Dr. Prince's
11:46 8 report, he cites peer-reviewed articles and -- that say that
11:46 9 both external and validity don't have to be assessed. There's
11:46 10 no dispute that Dr. Prince did an external validity test.

11:46 11 And the papers that we cite, in fact, say -- including
11:46 12 some of the ones that Dr. Steckel cites himself, say that the
11:46 13 external validity is the more rigid test for validating the
11:46 14 expert report and even say that the internal validity test is
11:46 15 only for a limited reason, which is to predict the -- a
11:47 16 consumer's, like, purchase decision as opposed to what
11:47 17 Dr. Prince was doing, which was applying it exactly as counsel
11:47 18 said, to the broader population and determining a willingness
11:47 19 to pay.

11:47 20 And so what Dr. Prince actually did is he put a control in
11:47 21 his survey, which was storage in a phone. And he actually
11:47 22 said -- he surveyed and he said, okay. So let me look at how
11:47 23 the survey respondents responded to how much more they would
11:47 24 pay for storage, and then he compared that to what actually
11:47 25 happens in the market. And he validated that the survey

11:47 1 actually predicted the external -- how much somebody would pay
11:47 2 for a feature, and that is an external validity.

11:47 3 And so we've cited a number of sources. This is a classic
11:47 4 dispute between the experts as to how the survey should be
11:47 5 formulated and how it should be validated, and it is something
11:47 6 that is not inappropriate for Daubert and it should be denied.

11:48 7 MR. MCKEON: Your Honor, if I may make a couple quick
11:48 8 points?

11:48 9 THE COURT: Whatever you care to.

11:48 10 MR. MCKEON: I think the -- leave aside the peer-reviewed
11:48 11 and general-acceptability point, I'm going to focus on the
11:48 12 error rates.

11:48 13 It's clear, Your Honor, and I think the literature is
11:48 14 clear on this, that -- and sort of the logic is clear, that
11:48 15 you've got to have internal validity and you have to have
11:48 16 external validity. Both tests are important.

11:48 17 But if you don't have internal validity, how are you going
11:48 18 to apply your survey results to a broader population?

11:48 19 There's no logical sense there, Your Honor, but the error
11:48 20 rates -- I want to focus on error rates. What counsel said
11:48 21 here, that Dr. Prince did this external validity analysis --
11:49 22 and he did, he -- the internal validity, there's no response to
11:49 23 that. But he did do an external validity analysis.

11:49 24 And what he did was, he compared actual memory -- the
11:49 25 prices of memory, which was one of the features in the survey.

11:49 1 And when he went to calculate the willingness to pay and
11:49 2 compared it to the actual market price to what happens in the
11:49 3 survey, he -- what he determined was that he had it -- it was
11:49 4 wrong.

11:49 5 So he had a lower -- he lowered it by 33 percent that he
11:49 6 was getting the -- it wasn't matching, that there was no
11:49 7 validity, and so he lowered it by 33 percent.

11:49 8 So even his analysis with respect to the external validity
11:49 9 was problematic.

11:49 10 But I just go back to the basic point, Your Honor, on the
11:49 11 errors. If you don't have internal validity, it's -- I mean,
11:50 12 it's -- basically, it's a random survey with a hit rate less
11:50 13 than 50 percent, then we don't believe it should go to the
11:50 14 jury, Your Honor.

11:50 15 With that I will sit down. Thank you.

11:50 16 THE COURT: Anything else?

11:50 17 MS. DE MORY: Very briefly, Your Honor. It is the case
11:50 18 that it is disputed whether or not you have to do internal
11:50 19 validity check for the purpose for which this survey was used.
11:50 20 And there are peer-reviewed papers and Prince's report in our
11:50 21 opposition on that point. So that's it.

11:50 22 (Off-the-record bench conference.)

11:51 23 THE COURT: Court is going to deny the motion.

11:51 24 We are going to take our lunch recess. Why don't we plan
11:51 25 on getting started at 1:15? I think that will give everyone

11:51 1 enough time. For those of you who are not from Waco, there's a
11:51 2 big food court right next door. And then there are restaurants
11:51 3 within a couple of blocks. So I'll see you.

11:51 4 THE BAILIFF: All rise.

11:51 5 (Recess taken from 11:51 to 1:19.)

01:19 6 THE BAILIFF: All rise.

01:19 7 THE COURT: Thank you. You may be seated.

01:19 8 Ladies and gentlemen, over the break I talked to my law
01:19 9 clerks, and I think I erred earlier when I said I was
01:19 10 invalidating the patent. I don't remember the patent number.
01:19 11 But what I'm going to do is I'm going to dismiss the patent
01:19 12 from the case.

01:19 13 In my opinion, it may have been in the complaint, but as I
01:19 14 understand it, and the plaintiff can correct me, there are
01:19 15 never any infringement contentions of the uncorrected patent
01:19 16 provided or anything done in the case.

01:20 17 So I'm dismissing it without prejudice. If the plaintiff
01:20 18 wants to reassert it in the uncorrected form, that's up to you.
01:20 19 But I'm dismissing the -- I'm not invalidating it. I'm not
01:20 20 going to invalidate, but I am going to dismiss it without
01:20 21 prejudice from the case, in that you have not prosecuted that
01:20 22 patent in this case.

01:20 23 MS. DE MORY: Thank you.

01:20 24 THE COURT: So let me turn, then, to -- Jeff just
01:20 25 suggested to me that we go back, because the -- my

01:21 1 understanding is the lawyer is now -- well, he always was
01:21 2 available, but my understanding is that we can now
01:21 3 technically -- oh, is not right?

01:21 4 Kristie's shaking her head.

01:21 5 MR. CORDELL: We came close, Your Honor. We were able to
01:21 6 get him in on everything except for your microphone. And we
01:21 7 were a little worried that you might be the person we should
01:21 8 actually involve. So we decided to have Mr. Black just pick up
01:21 9 the arguments.

01:21 10 THE COURT: Okay. Very good. Mr. Black?

01:21 11 MR. BLACK: Thank you, Your Honor.

01:21 12 So the good news is I've only had ten minutes to prepare
01:21 13 and therefore this will be relatively brief. I know we're on
01:21 14 limited time, and I'll try not to speak --

01:21 15 THE COURT: I had a trial once where everyone settled that
01:21 16 morning, and Judge Davis told me he would give me an extra
01:21 17 15 minutes to get ready for the opening argument.

01:21 18 MR. BLACK: Okay. This is nothing like that. I will try
01:21 19 not to talk too fast. I've been told I'm up against the
01:21 20 transcription limit, so I will try to keep the comments smooth.

01:21 21 Okay, Your Honor. So we have two motions here that are
01:21 22 joined together, motion for partial summary judgment of no
01:22 23 indirect infringement and motion for partial summary judgment
01:22 24 of no willfulness.

01:22 25 They really turn on the same set of facts, whether or not

01:22 1 there is sufficient scienter to justify putting to the jury the
01:22 2 question of induced infringement or willfulness. We have the
01:22 3 legal standards here. Your Honor knows them well. Your Honor
01:22 4 applies them frequently in evaluating complaints.

01:22 5 Now, the interesting thing about this case is we have
01:22 6 three patents -- or we did have three patents. Each of which
01:22 7 would require independent proof of indirect infringement and
01:22 8 willfulness evidence. The plaintiff is proceeding rather
01:22 9 unusually on a willful blindness path. And what that means is
01:22 10 they have to show under the law that the -- there's evidence
01:22 11 that -- of conduct that is not negligent, not reckless, but
01:22 12 more than reckless conduct is what's at stake here.

01:22 13 And they do not have any evidence that would support that
01:22 14 kind of an inference. And it is their burden. They can't meet
01:23 15 that burden by arguing about Samsung's privileged objections or
01:23 16 whatever. They have to show that there's going to be evidence
01:23 17 that they're going to produce at trial.

01:23 18 And we've filed a Rule 56 motion. It's their time to come
01:23 19 forward and show us what the evidence is. And the problem is
01:23 20 they don't have any evidence.

01:23 21 On Count 3 of the complaint for the '202 patent, that
01:23 22 patent was filed long after the original settlement in the
01:23 23 case. And there's no evidence that Samsung was aware of it.
01:23 24 And therefore, as a matter of law, we're entitled to judgment
01:23 25 of no indirect liability and no willfulness with respect to the

01:23 1 '202.

01:23 2 On Count 2 of the complaint, the '825 patent, the
01:23 3 application for that patent was known to Samsung at the time of
01:23 4 the original settlement. However, however, the claims that
01:23 5 were pending at the time of the settlement were all cancelled,
01:23 6 every single one of them. They stood rejected at the time of
01:23 7 the settlement and then they were cancelled six months later,
01:24 8 and they were replaced with new claims which eventually issued
01:24 9 into the claims that are involved in this case.

01:24 10 So their argument with respect to those claims is that
01:24 11 Samsung was willfully blind because it failed to follow the
01:24 12 prosecution of their patent applications through the Patent
01:24 13 Office. Even though they obviously made decisions along the
01:24 14 way to not give us notice when the '962 issued, not give us
01:24 15 notice when the '825 issued, not give us notice when the '202
01:24 16 issued.

01:24 17 Those were conscious litigation-driven decisions, and they
01:24 18 have to live with the consequences of them. They can't push
01:24 19 our lack of knowledge back on us, saying we had some
01:24 20 affirmative obligation.

01:24 21 There's no case law supporting what they're doing here.
01:24 22 And the law is pretty clear. Willful blindness doesn't mean
01:24 23 negligence, it doesn't mean reckless. It means more than
01:24 24 reckless conduct, and the only evidence they have and the only
01:24 25 fact they have is that we were aware of rejected, ultimately

01:24 1 not issued claims in the '825 patent, and they have no evidence
01:25 2 on the '202.

01:25 3 The '962, Count 1, that's now out of the case. So what's
01:25 4 their evidence? Here's the time to show it at summary
01:25 5 judgment. Where's the positive evidence?

01:25 6 They don't have any.

01:25 7 That's our submission, Your Honor.

01:25 8 MR. BUNSOW: Good afternoon, Your Honor.

01:25 9 THE COURT: Good afternoon.

01:25 10 MR. BUNSOW: Henry Bunsow for Theta IP.

01:25 11 THE COURT: I think this is the first time I've had you in
01:25 12 my court, isn't it?

01:25 13 MR. BUNSOW: Your Honor, this is the first time, and I
01:25 14 have to confess that I've been spending the last decade in the
01:25 15 Eastern District of Texas.

01:25 16 THE COURT: That's okay. I spent a lot of time in the
01:25 17 Eastern District of Texas.

01:25 18 MR. BUNSOW: I'll tell you, I like the drive here from
01:25 19 Dallas a lot better.

01:25 20 THE COURT: Well, it's -- let's see. It's shorter, I
01:25 21 guess, for sure shorter than Tyler, isn't it?

01:25 22 MR. BUNSOW: Oh, and way shorter than Marshall.

01:25 23 THE COURT: Way shorter than Marshall, for sure.

01:25 24 MR. BUNSOW: For sure. And I'd say better scenery too.

01:25 25 So there are two motions here, the one on willfulness and

01:26 1 the one on induced infringement allowing us to go back in time,
01:26 2 pre-filing, for damages, and both of those are supported by the
01:26 3 case law on a willful blindness showing and also because the
01:26 4 jury can infer, based on the evidence that will be presented,
01:26 5 that Samsung knew or should have known.

01:26 6 And remember, that's the test, knew or should have known,
01:26 7 very similar to the test in statute of limitations.

01:26 8 What counsel failed to mention is that in 2017, when the
01:26 9 prior case was resolved, there was a covenant not to sue. And
01:26 10 during those negotiations, Samsung explicitly asked for the
01:26 11 covenant not to sue to extend to all patents in that family,
01:27 12 from the parent to all siblings.

01:27 13 At that time, there were two siblings pending, another
01:27 14 sibling came along later, but Samsung knew that those patents
01:27 15 could be a problem down the road and they tried to get
01:27 16 clearance. Theta told them, no, that they would not grant them
01:27 17 licenses to those patents.

01:27 18 Now, Samsung is not a babe in the woods when it comes to
01:27 19 patent matters. They're one of the most litigious patent
01:27 20 litigants in the country and have been for many, many years.

01:27 21 So when faced with the prospect that patents coming off
01:27 22 the parent that was previously litigated might be a problem, I
01:27 23 would submit to you that that alone meets the knew or should
01:28 24 have known test for them to be responsible for willful
01:28 25 blindness or for their knowledge to be implied.

01:28 1 But that's not all. Up until the time of the covenant not
01:28 2 to sue, Samsung regularly tested its products and they tested
01:28 3 power consumption for differing signals, basically what we're
01:28 4 talking about in these patents at a high level. They did that
01:28 5 testing through the end of that case, and they documented it
01:28 6 regularly.

01:28 7 After they asked for a license to the siblings of the
01:28 8 parent application, suddenly the documenting stopped, but
01:29 9 Samsung didn't stop the testing. They continued doing the
01:29 10 testing. They just stopped documenting it. And the reason
01:29 11 they stopped documenting it is because they knew that they
01:29 12 could be facing a patent infringement claim down the line on
01:29 13 these patents that dealt with power modifications for varying
01:29 14 signals, and they didn't want a record showing that they
01:29 15 continued to test.

01:29 16 That alone shows their knowledge of the applications that
01:29 17 were pending and the prospect that they might be responsible.
01:29 18 They knew or should have known.

01:29 19 THE COURT: Did you depose anyone at Samsung, 30(b)(6) or
01:29 20 otherwise, to inquire the reason the documentation stopped?

01:30 21 MR. BUNSOW: We did. There was a 30(b)(6) witness that we
01:30 22 deposed. And he confirmed that the documenting stopped but the
01:30 23 testing continued. And there was no reason given for that.

01:30 24 But there's more. Because we went further in discovery on
01:30 25 this issue with their 30(b)(6) witnesses, with interrogatories

01:30 1 and with every type of discovery we could think of. As you
01:30 2 know, this issue has been before the Court several times.

01:30 3 This is the subject matter of Motion in Limine No. 3.
01:30 4 Basically Samsung blocked, under claim of privilege, any effort
01:30 5 to ascertain their direct knowledge. Not that direct knowledge
01:30 6 is necessary, but, nonetheless, to block our getting direct
01:30 7 knowledge.

01:30 8 They have no answer to the circumstantial evidence that
01:31 9 shows that they knew or should have known about these
01:31 10 applications and that they were in jeopardy. They have no
01:31 11 response. The only thing they have is an unverified
01:31 12 interrogatory answer where they say that having learned of the
01:31 13 applications, they did not follow them and did nothing else.
01:31 14 In other words, willful blindness.

01:31 15 But that unverified interrogatory answer is hearsay. It's
01:31 16 not admissible into evidence. And every witness we asked about
01:31 17 this was blocked on a privilege claim. And you warned them
01:31 18 what would happen with those types of privilege objections and
01:31 19 they persisted anyway.

01:31 20 So here's the state of the record: Samsung knew in 2017
01:31 21 that there were sibling applications coming off of the parent
01:32 22 that they had previously been sued under. Samsung asked for a
01:32 23 license, clearance to those sibling applications and was
01:32 24 denied. Samsung had been doing testing, and they knew that
01:32 25 their products practiced at least what was disclosed in the

01:32 1 specification of those patents.

01:32 2 This was a huge red flag, a red flag for a company that is
01:32 3 a sophisticated patent litigant, which they decided to ignore.
01:32 4 We have cited multiple cases on Pages 10 and 11 of our brief
01:32 5 that supports a finding of willful blindness in this case,
01:32 6 supports induced infringement and supports willfulness.

01:32 7 In the final analysis this may come down to a credibility
01:33 8 issue if they're allowed to put on any evidence. They
01:33 9 shouldn't be, and we'll see what happens with Motion in Limine
01:33 10 No. 3. But if they claim somehow that they had no knowledge,
01:33 11 that is simply incredible. And we all know credibility is an
01:33 12 issue for the jury. And I think I know how they would decide.

01:33 13 THE COURT: Well, on the willfulness, that -- that's in
01:33 14 front of me.

01:33 15 MR. BUNSOW: Correct.

01:33 16 THE COURT: Okay. Got it.

01:33 17 MR. BUNSOW: That is correct. The credibility issue on
01:33 18 the inducement would be for the jury.

01:33 19 THE COURT: Got it.

01:33 20 MR. BUNSOW: Thank you, Your Honor. I appreciate, by the
01:33 21 way, all the time you've given us today. It was very generous.

01:33 22 THE COURT: You're more than welcome. Well, I have the
01:33 23 best job in the world. I get to have the best lawyers in the
01:33 24 world appear in front of me routinely. So it's -- and there
01:33 25 are days I shouldn't even get paid for doing this, and this is

01:33 1 probably one of them.

01:33 2 MR. BUNSOW: I'm not sure I'd put that on the record, but
01:34 3 thank you.

01:34 4 THE COURT: Every time I have a hearing with lawyers this
01:34 5 good, I walk in and out of the courthouse feeling unbelievably
01:34 6 blessed.

01:34 7 MR. BUNSOW: Thank you, Your Honor.

01:34 8 THE COURT: Mr. Black?

01:34 9 MR. BLACK: Certainly, Your Honor.

01:34 10 So everything we just heard about the law and about the
01:34 11 facts and about what's in their motion is wrong. The standard
01:34 12 under current law, 2015, the Commil case, Supreme Court, is:
01:34 13 Like induced infringement, contributory infringement requires
01:34 14 knowledge of the patent-in-suit and knowledge of the patent
01:34 15 infringement.

01:34 16 Not if they knew or should have known standard. This is
01:34 17 the Federal Circuit, 2021: To establish willfulness, the
01:34 18 patentee must show the accused infringer had a specific intent
01:34 19 to infringe at the time of the challenged conduct.

01:35 20 Specific intent. There must be knowledge of the patent
01:35 21 and knowledge that the activities in question are, in fact,
01:35 22 infringing.

01:35 23 I addressed the knowledge of the patent issue. You heard
01:35 24 nothing at all about the '202 patent. There's no evidence
01:35 25 whatsoever in the case that anyone from Samsung knew about the

01:35 1 '202 patent. There's no evidence they knew about the '825
01:35 2 patent before they were sued.

01:35 3 There is deposition testimony on it. It's in our brief.
01:35 4 Our witnesses said, unequivocally, we did not know about those
01:35 5 patents. We were not monitoring prosecution.

01:35 6 There was no privilege claim made on that. We provided an
01:35 7 interrogatory answer on it. They don't like the answer. The
01:35 8 answer was verified, and it was supported in the 30(b) (6)
01:35 9 deposition.

01:35 10 This business about power testing, well, I imagine Samsung
01:35 11 does testing of power control on some of its products, but what
01:36 12 does that have to do with showing that there is infringement in
01:36 13 this case? What does that have to do with the patents?

01:36 14 That's not been shown. There's no inference that because
01:36 15 Samsung does power testing or did or didn't document something
01:36 16 over a period of time that that is somehow evidence of willful
01:36 17 blindness, evidence of indirect infringement.

01:36 18 There's just no evidence in the case that they've produced
01:36 19 in their brief, other than the fact that we had a prior
01:36 20 litigation with them, which was dismissed. The '825 patent
01:36 21 claims did not exist at the time of the case settlement. The
01:36 22 '202 had not even been filed.

01:36 23 They know that under the law they can collect damages for
01:36 24 pre-suit infringement if they provide the notice that's
01:36 25 required, notice of infringement or marking if they made

01:36 1 products, which they don't. But they decided not to do that.
01:36 2 That decision was on them. And they cannot rely solely on the
01:37 3 argument that because Samsung asked for a broad covenant so
01:37 4 that they'd never have to hear from these people again, which
01:37 5 is what happened, they cannot rely on that to say that, oh, if
01:37 6 they ever do get any patents later, Samsung's now willfully
01:37 7 blind under the law and subject to willfulness and indirect
01:37 8 infringement.

01:37 9 Patentee bears some burden here. And in this case they
01:37 10 bear the burden of telling the patentee, the alleged infringer,
01:37 11 about the infringement and the nature of the infringement.

01:37 12 It's particularly a problem here because what was accused
01:37 13 in the last case was a product called IntelliCeiver. And
01:37 14 that's what they sued us on. They sued us on IntelliCeiver,
01:37 15 and then only after this case got started did they learn that
01:37 16 we don't use it anymore. And that therefore their entire
01:37 17 infringement theory had to be reworked.

01:37 18 But from a willful infringement inducement perspective, we
01:37 19 did not know about the patents. We did not know about the
01:37 20 alleged infringement. And there's clearly insufficient
01:37 21 evidence to support a finding under the appropriate legal
01:38 22 standard, which is that we would have to be more than reckless
01:38 23 in knowing that we were infringers, when even they did not know
01:38 24 when they filed this case that we had stopped using
01:38 25 IntelliCeiver.

01:38 1 But the bottom line, there's been no case that the Federal
01:38 2 Circuit has ever affirmed, and we're not aware of any district
01:38 3 court cases either, where someone's been allowed to go to trial
01:38 4 on an issue, or even get past a complaint on an issue where
01:38 5 they didn't even have knowledge of the patent like the '202.
01:38 6 Or where a patent was in prosecution and the claims were
01:38 7 completely changed.

01:38 8 They just haven't met their burden of production on
01:38 9 summary judgment and the issue should not be submitted to the
01:38 10 jury.

01:38 11 THE COURT: Anything else, sir?

01:38 12 MR. BUNSOW: Very briefly, Your Honor. All of the cases
01:38 13 that we cite on Pages 10 and 11 were summary judgment cases
01:38 14 where the -- this exact motion, basically, was denied. And
01:38 15 counsel talks about evidence that they did not know about the
01:39 16 patents. We've provided, I think, ample evidence that they
01:39 17 knew or should have known or actually did know, from which a
01:39 18 jury could infer that they did know.

01:39 19 He points to an interrogatory response and a 30(b) (6)
01:39 20 statement from a witness with no personal knowledge who simply
01:39 21 read what counsel wrote for him so he could read it into the
01:39 22 record of a deposition, neither of which, I submit, are
01:39 23 introducible into evidence and will not be part of the record
01:39 24 of this case.

01:39 25 So what the jury will have is Samsung's knowledge that

01:39 1 applications were coming out of the parent application -- the
01:39 2 parent patent rather. And that it sought a license to those
01:39 3 and was denied, that they related directly to the technology at
01:39 4 issue in this case. And I submit that that alone is sufficient
01:40 5 from which a jury could infer their knowledge, and that it will
01:40 6 support inducement.

01:40 7 I agree with you that willfulness is for the Court, and I
01:40 8 think we should probably take that up after the evidence is in.
01:40 9 I think the record will support willfulness at that time as
01:40 10 well.

01:40 11 Thank you, Your Honor.

01:40 12 THE COURT: Anything else?

01:40 13 MR. BLACK: Yeah. Just we have to separate out the
01:40 14 patents here, Your Honor.

01:40 15 At the time of the settlement, there were two applications
01:40 16 pending. One was the '962 patent application, which is now out
01:40 17 of the case, so it's irrelevant. The '825 application didn't
01:40 18 include the claims at issue here. They had been rejected and
01:40 19 were all cancelled.

01:40 20 Are you willfully blind to infringing rejected claims in
01:40 21 the Patent Office? Are you required to monitor all your
01:40 22 competitors' applications to see what they may do, or are the
01:40 23 competitors required to give you notice when they think there's
01:41 24 a problem?

01:41 25 That's what this is about. All these claims were

01:41 1 rejected. They filed new ones, which is what are at issue now.

01:41 2 And on the '202, there's no evidence whatsoever.

01:41 3 They have not produced a case from which you could
01:41 4 conclude -- any reasonable jury could conclude that Samsung had
01:41 5 knowledge or was beyond reckless.

01:41 6 In addition, they haven't address the fact that the key
01:41 7 infringement evidence in the case came from Qualcomm source
01:41 8 code, which is not available to Samsung. And to the extent
01:41 9 they are going to put forward a case on inducement, they cannot
01:41 10 rely on that information because it was not within Samsung's
01:41 11 knowledge.

01:41 12 There was neither knowledge of the patent nor knowledge of
01:41 13 the nature of infringement before suit or, frankly, until they
01:41 14 gave us final infringement contentions in the middle of 2021.

01:41 15 Thank you.

01:41 16 MR. BUNSOW: Two things, Your Honor.

01:41 17 Counsel himself stated that the request for a license
01:42 18 included the entire family coming off of the parent patent.
01:42 19 There's no reason to parse out one application over another.
01:42 20 It was the parent. And as you know, all of these siblings are
01:42 21 tracked off the parent in the Patent Office records and they're
01:42 22 very easy to follow.

01:42 23 So if they followed one, they followed them all. There's
01:42 24 no question about that.

01:42 25 The second thing is -- and I just want to do this by way

01:42 1 of an offer of proof if possible -- Samsung knows what's in the
01:42 2 Qualcomm code because they have the code, and they have the
01:42 3 code that relates to this particular functionality.

01:42 4 We have copies of that, both the Samsung and the Qualcomm
01:42 5 code. It is identical line for line. What Samsung has been
01:42 6 saying in this case about not knowing what's in the Qualcomm
01:43 7 code is absolutely false, and we will prove it.

01:43 8 Thank you.

01:43 9 MR. BLACK: There was a request at the time of the
01:43 10 settlement, Your Honor, to be done with these people, we said,
01:43 11 we would like you to give us the license to all your patents,
01:43 12 they said no.

01:43 13 This happens every day in negotiations between companies.
01:43 14 You don't walk away with a licensed negotiation pregnant with a
01:43 15 requirement to monitor a counterparty's patent applications.

01:43 16 There's no evidence in the case on the '202. On the '825,
01:43 17 the claims that were at issue at the time of the settlement
01:43 18 were -- had been rejected, were cancelled. They amended those
01:43 19 claims. That's why we're here. There's been no knowledge of
01:43 20 the amended claims or the '202 patent.

01:43 21 Thank you.

01:43 22 THE COURT: Anything else?

01:43 23 MR. BUNSOW: I think we joined issue adequately, Your
01:43 24 Honor.

01:44 25 (Off-the-record bench conference.)

01:46 1 THE COURT: With respect to the '202 patent, the Court is
01:46 2 going to grant the motion for summary judgment with respect to
01:47 3 any claim of willfulness.

01:47 4 With respect to both the '202 and the '825 patent, the
01:47 5 Court is going to deny the motion for summary judgment with
01:47 6 respect to claims of indirect infringement.

01:47 7 So let me find what the next motion is. Give me one
01:47 8 second.

01:47 9 MS. DE MORY: I'm sorry.

01:47 10 THE COURT: Yes, ma'am.

01:47 11 MS. DE MORY: So we have up next the objections to
01:47 12 witnesses that we filed, but we're actually going to take those
01:47 13 up with our motions in limine because they overlap
01:47 14 substantially.

01:47 15 THE COURT: Have we done all the Dauberts?

01:48 16 MS. DE MORY: Oh, okay. Sorry. I got up before somebody
01:48 17 else.

01:48 18 THE COURT: If it -- yeah. Okay. If it wasn't clear, by
01:48 19 omission, my law clerk just reminded me, I granted the motion
01:48 20 for summary judgment with regard to the '202 patent and
01:48 21 willfulness. I'm denying it with respect to the '825, if that
01:48 22 wasn't clear. So I apologize if it wasn't.

01:48 23 And then with respect to indirect infringement, it's still
01:48 24 in the case for both the '202 and the '825.

01:48 25 MR. MCKEON: I believe our next motion, Your Honor,

01:48 1 relates to Dr. Larson. It's a Daubert.

01:48 2 THE COURT: That's what I have. Yes. Thank you.

01:48 3 MR. MCKEON: All right. So with respect to this issue,

01:48 4 Your Honor, it's related. Even though Dr. Larson's a technical
01:49 5 expert, this relates to the damages case. And what Dr. Larson

01:49 6 did was did an analysis on an accused product, is try to

01:49 7 evaluate with respect to the patented feature, tried to

01:49 8 evaluate what battery savings would be achieved with the use of

01:49 9 the patented feature.

01:49 10 And in the end he comes out with a 20.9-minute battery --

01:49 11 extra battery life by using -- the allegation is by Samsung's

01:49 12 use of the patented feature they gain an extra 20.9 minutes of

01:49 13 battery life. And it's a technical analysis that he undergoes.

01:49 14 But there's two, we believe, significant problems that

01:49 15 will prevent this from going to the jury. One relates to

01:49 16 apportionment which is, you know, standard damages law. But

01:49 17 it's important to consider this issue in the context of when

01:49 18 you're evaluating technical improvements. And the other is a

01:49 19 speculation that Dr. Larson does in his analysis.

01:50 20 So let me just hit it quickly here on the first one, the

01:50 21 apportionment. Your Honor knows the law well, but I want to

01:50 22 put a real fine point on the issue that we're talking about.

01:50 23 We know that in every case, in every case you got to have

01:50 24 apportionment from the profits and the damages with respect to

01:50 25 the patented feature and the unpatented feature. So that's the

01:50 1 comparison that has to happen. What the improvement is, the
01:50 2 patented feature, and what is out there unpatented in the prior
01:50 3 art.

01:50 4 More case law we have here on Slide 5, Your Honor. The
01:50 5 Lucent case I know you're well aware of. You have to show the
01:50 6 particular improvement that is added for the patented feature.
01:50 7 And then the AstraZeneca case that we cite here is a really, I
01:50 8 think, helpful case. That you have to show the value created
01:50 9 beyond conventional elements. So that's -- frames up what the
01:50 10 analysis needs to be.

01:50 11 And what happened here in this case, Your Honor, starting
01:51 12 in the prosecution history of the patents at issue, but even in
01:51 13 the Markman process, they're very clear here that in the prior
01:51 14 art, in the prior art the two current modes or two states with
01:51 15 respect to battery savings -- to achieve battery savings by
01:51 16 having these two states, that is in the prior art.

01:51 17 And they've said that to Your Honor in the briefing.

01:51 18 Dr. Tsividis, the inventor, is very clear on that, that
01:51 19 switching between two levels -- that you're trying to achieve
01:51 20 battery savings by switching between two levels, that's in the
01:51 21 prior art. And their corporate representative, again, same
01:51 22 testimony in this case.

01:51 23 And what did Dr. Larson do in the technical part of his
01:51 24 analysis?

01:51 25 And here on the screen it shows you what he did, and it's

01:51 1 very simple. What he did was, he analyzed it between two
01:51 2 states. Two states was the analysis that he did to evaluate
01:51 3 the power savings to come up with this 20.9 minutes. That's
01:52 4 precisely the prior art approach.

01:52 5 So all he has done here is evaluated -- to the extent you
01:52 6 can rely on his analysis, the only thing he's done, at best, is
01:52 7 evaluated what the improvement would be with doing the prior
01:52 8 art.

01:52 9 And we just think, Your Honor, that's just -- he's got to
01:52 10 do more than that. He's got to isolate the patented feature.
01:52 11 It's admitted that the test that he performed here is the prior
01:52 12 art. And we think, Your Honor, that's not good enough. He's
01:52 13 got to do more than that under the case law.

01:52 14 And the second point, Your Honor, is the speculation. And
01:52 15 what's going on there?

01:52 16 In this test, what Dr. Larson did was, he took a phone --
01:52 17 represented a phone and he used a Verizon test that Verizon
01:52 18 has. It's called Verizon Idle Mode. And when you want to test
01:52 19 battery life in a phone, you can use the Verizon Idle Mode.

01:52 20 But what is critical is, if you're going to use the

01:52 21 [REDACTED]

01:53 22 [REDACTED]

01:53 23 [REDACTED]

01:53 24 you get vastly different results because they're different
01:53 25 power levels.

01:53 1 And he did the test, and what he used was the power state
01:53 2 cDRX. This is what he says in his report and his deposition.

01:53 3 Well, not that this is -- matters, frankly, Your Honor,

01:53 4 [REDACTED]
01:53 5 [REDACTED] It
01:53 6 means you're connected to the network.

01:53 7 In the idle mode, you're not. It's DRX. That was the
01:53 8 mode that's relevant here. And when we asked in his deposition
01:53 9 the difference between the cDRX and the DRX [REDACTED]

01:53 10 [REDACTED], his testimony, Your
01:54 11 Honor: I have no idea.

01:54 12 He doesn't know.

01:54 13 Now, again, our expert says it's DRX, but you don't even
01:54 14 need to get into that point. He doesn't even know what the
01:54 15 right mode is. And we know that it's different. You get a
01:54 16 different result depending on which one you use.

01:54 17 And based on that, Your Honor, it's -- his result is
01:54 18 purely speculative. So whether it's an apportionment problem
01:54 19 or the speculation problem, we think that this analysis
01:54 20 shouldn't be able to go to the jury.

01:54 21 And with that, Your Honor, I submit the issue. Thank you.

01:54 22 THE COURT: If you'll give me just one second.

01:54 23 (Off-the-record bench conference.)

01:54 24 THE COURT: The Court is going to deny that motion.

01:55 25 The next motion up I have -- he may be there. I don't

01:55 1 know who's going to do this for the plaintiffs. On my chart it
01:55 2 says plaintiffs have a Daubert on damages. So that's what I
01:55 3 have up next.

01:55 4 Yes, sir. Good morning -- good afternoon.

01:55 5 MR. FLYNN-O'BRIEN: Good morning -- good afternoon, Your
01:55 6 Honor. This is Michael Flynn-O'Brien for Theta IP. And I'll
01:55 7 be arguing Theta's motion to preclude testimony regarding
01:55 8 alleged comparable licenses.

01:55 9 All right. In this case Samsung seeks to present the
01:55 10 damages case to the jury based on two prior license agreements.
01:55 11 As this Court is well aware, a reasonable royalty determination
01:55 12 may be based on a prior license agreement, but only if they are
01:56 13 economically and technically comparable to the asserted
01:56 14 patents.

01:56 15 Here Samsung fails both tests. Its technical expert does
01:56 16 not present any reliable evidence or analysis of technical
01:56 17 comparability. Its damages expert does not present any
01:56 18 reliable evidence or analysis of economic comparability.

01:56 19 This is Samsung's burden and it has not met it. As such,
01:56 20 their testimony on these license agreements should be excluded.

01:56 21 As background, even though Samsung has undoubtedly entered
01:56 22 into hundreds of license agreements, it only produced four in
01:56 23 this case. And it produced no additional information at all
01:56 24 about those four agreements.

01:56 25 When we asked their 30(b) (6) witness on these topics for

01:56 1 additional information, he didn't recognize one of them, one of
01:56 2 which happens to be one of the two that Samsung's damages
01:56 3 expert relies upon in this case. Their 30(b) (6) witness
01:56 4 couldn't explain why these four agreements had been chosen.
01:56 5 And he couldn't provide any details about the circumstances of
01:57 6 these agreements whatsoever.

01:57 7 Against that background, here comes Samsung's technical
01:57 8 and damages experts. First instance, Samsung's technical
01:57 9 expert fails to apply any standard for technical comparability
01:57 10 at all. He bases his opinions on mere cursory statements. He
01:57 11 provides single-sentence opinions, and provides no analysis
01:57 12 whatsoever as to how the patents at issue in the challenged
01:57 13 licenses are comparable to the technology at issue in this
01:57 14 case.

01:57 15 Here are the two agreements. On the left there's a
01:57 16 settlement agreement that we've called the █ agreement.
01:57 17 Dr. Kiaei, Samsung's technical expert's opinion on this
01:57 18 agreement is contained in a single sentence in his report.
01:57 19 There are no citations to the underlying patent. There's not
01:57 20 assessment of the differences in the technology between the
01:57 21 patent at issue in that agreement and the patents at issue in
01:57 22 this case. There's no assessment whether or how inventions
01:58 23 would actually work in the context of the technologies at issue
01:58 24 here. There's no assessment of the power savings or battery
01:58 25 life, if any, that would have been provided by that patent.

01:58 1 There's no assessment of the costs to implement the inventions.
01:58 2 There's no comparison beyond general reference to power
01:58 3 consumption and digital processor or electronics.

01:58 4 But perhaps the most damning here is their citations to
01:58 5 the actual, you know, substantive spec or claims of the patent
01:58 6 at issue in the [REDACTED] agreement.

01:58 7 But the other agreement at issue, Dr. Kiaei's analysis
01:58 8 fares no better. Again, there are -- I think there are five
01:58 9 patents at issue in that agreement. With respect to each he
01:58 10 provides a single sentence for just generally describing the
01:58 11 field of use, the patent at issue. Again, he provides no
01:58 12 citations to the underlying patents, no assessment of the
01:58 13 differences in technologies, no assessment of how the patents
01:58 14 would work, no assessment of power savings or battery life,
01:58 15 et cetera.

01:58 16 So as discussed above and in the cases cited in our
01:59 17 motion, merely because patents could be said to be in the same
01:59 18 field of use does not make the patents technically comparable.
01:59 19 This is a sort-of technical comparability or lack of technical
01:59 20 comparability analysis that courts routinely preclude experts
01:59 21 from making. The Court should do the same here.

01:59 22 Next slide, please.

01:59 23 Samsung's damages expert, Dr. Ugone, doesn't fare any
01:59 24 better on economic comparability. The portion of his report
01:59 25 related to these two agreements is shown here on this slide.

01:59 1 Again, we have lack of citations. We have a lack of analysis.
01:59 2 He utterly fails to access the utility of a [REDACTED]
01:59 3 patents, much less compare the utility of those patents to the
01:59 4 utility of the Theta patents at issue in this case. He fails
01:59 5 to access the economic circumstances of the parties negotiating
01:59 6 those agreements or the economic circumstances of those
01:59 7 particular negotiations.

01:59 8 He fails to account for the fact that those licenses were
02:00 9 not negotiated under assumptions of validity or infringement.

02:00 10 In his papers, Samsung tries to bob and weave through the
02:00 11 case law on this subject but to no avail. Because what we have
02:00 12 here is a pair of experts that provide no analysis on the
02:00 13 issues at all.

02:00 14 So the -- here, the threshold question is admissibility,
02:00 15 not weight. And because Samsung's experts have not shown or
02:00 16 not carried Samsung's burden that the underlying technology is
02:00 17 technically comparable or that the agreements are economically
02:00 18 comparable, Samsung's expert opinions on these licenses should
02:00 19 be excluded.

02:00 20 And I'll pass the podium.

02:00 21 MR. TISHMAN: Good afternoon, Your Honor. Daniel Tishman
02:00 22 on behalf of defendants.

02:00 23 May it please the Court.

02:00 24 THE COURT: Welcome to my court.

02:00 25 MR. TISHMAN: Thank you.

02:00 1 Your Honor, the first thing I want to address is one of
02:00 2 the things that my co- -- or my counsel discussed at the very
02:01 3 beginning related to discovery disputes.

02:01 4 He talked about the number of licenses that were produced.
02:01 5 That's an issue that -- we're well past discovery, so I just
02:01 6 want to set that aside.

02:01 7 On the issues of technical and economic comparability,
02:01 8 I'll be brief, Your Honor. This is a fairly straightforward
02:01 9 issue.

02:01 10 Dr. Kiaei offered reliable testimony -- or reliable
02:01 11 opinions on technical comparability. The law requires an
02:01 12 expert to provide a baseline of comparability, but the degree
02:01 13 of comparability is something that's reserved to the jury.

02:01 14 On technical comparability, Dr. Kiaei explained that the
02:01 15 patents in the [REDACTED] licenses related to
02:01 16 technical -- technically comparable technology. He explained
02:01 17 that the [REDACTED] patent related to power conservation within a
02:01 18 specific component of an electrical system and that it could be
02:01 19 incorporated into a mobile phone.

02:01 20 So he explained the field is comparable, the invention is
02:02 21 comparable and the products are comparable.

02:02 22 THE COURT: Well, he makes that statement. I get that.
02:02 23 What does he do to support that statement in his report?

02:02 24 I mean, I get someone -- either he or someone helpful to
02:02 25 him put that in there because I know you needed to have that

02:02 1 for your damages expert, but where does he explain the basis of
02:02 2 that just conclusory sentence? Anywhere?

02:02 3 MR. TISHMAN: It's a rather short section, but it says
02:02 4 what it needs to say. He identifies the patent --

02:02 5 THE COURT: Well, I was going to say, I think I get to be
02:02 6 the judge of that. Not to be funny, but what I -- I mean, he
02:02 7 makes the statement -- he makes the conclusory statement X.
02:02 8 Where does he explain in his report -- if someone on
02:02 9 plaintiff's counsel says, what is your basis for saying that?

02:03 10 And I restrict the expert to what he has disclosed in his
02:03 11 report in his answer, where is it at in his report, his basis
02:03 12 for saying that?

02:03 13 MR. TISHMAN: It's in this -- these two paragraphs, Your
02:03 14 Honor, 506 and 507. He identifies the patent. He doesn't give
02:03 15 a pincite, but he points to the evidence that he's going to
02:03 16 rely on.

02:03 17 It's the patent. He quotes it, that it can be
02:03 18 incorporated into a mobile phone. And then he explains that
02:03 19 Theta's expert, Dr. Larson, didn't even address the [REDACTED]
02:03 20 agreement whatsoever and didn't dispute the technical
02:03 21 comparability.

02:03 22 THE COURT: Okay. Let me try again.

02:03 23 So I have Paragraph 506. Your expert states that the [REDACTED]
02:03 24 patent is technically comparable -- let me just say that -- try
02:03 25 it this way.

02:03 1 Your witness is on the stand and you put him on in direct.
02:03 2 And on the stand, he says that the ' [REDACTED] patent that was the
02:04 3 subject of one of the licenses you all want to use is
02:04 4 technically comparable to the asserted patents in that, one,
02:04 5 the patent directly reads on power concentration within a
02:04 6 specific component of an electrical system such as might be
02:04 7 incorporated into a mobile phone, as referred within the patent
02:04 8 specification.

02:04 9 And counsel for plaintiff gets up and says, what is your
02:04 10 basis for making that conclusory statement?

02:04 11 Where in your -- in his report does he give the basis for
02:04 12 making that statement, if anywhere?

02:04 13 MR. TISHMAN: The basis is 506. It's the patent. And
02:04 14 they had a chance to ask him about this in his deposition --

02:04 15 THE COURT: No, no, no. I'm sorry. I didn't mean to
02:04 16 interrupt.

02:04 17 That where -- they have a chance to ask about it, and
02:04 18 deposition doesn't go very far with me. So what I care about
02:04 19 here is where beyond -- let me try it like this since I'm not
02:05 20 getting very far.

02:05 21 Where, besides in Paragraph 506, does this expert provide
02:05 22 an opinion with respect to why the ' [REDACTED] patent in the CRG
02:05 23 agreement was comparable?

02:05 24 Does he do it anywhere besides 506?

02:05 25 MR. TISHMAN: It's 506, Your Honor. And part of that

02:05 1 is -- and if I can turn to Haystack. Haystack, Dr. Larson, who
02:05 2 put in an opening report, explained why he didn't think
02:05 3 Haystack was comparable. And Dr. Kiaei responded to each of
02:05 4 his points.

02:05 5 But on [REDACTED], which was not addressed in Dr. Larson's
02:05 6 report, he explained that it's comparable. He pointed to the
02:05 7 patent and he explained that Dr. Larson doesn't seem to
02:05 8 disagree with him.

02:05 9 On Haystack he does walk through and explains that it
02:05 10 relates to power consumption and circuit components operating
02:05 11 in parallel such as could be implemented in smartphones. And
02:06 12 then he walks through and does that. I've highlighted a few
02:06 13 sentences here, but he does that for each of the patents. And
02:06 14 he explains how each of those patents address the comparable
02:06 15 field, invention and application.

02:06 16 Now, one of the things that we heard about when my
02:06 17 colleague on the other side was arguing, was there's no
02:06 18 standard provided. Dr. Kiaei is a technical expert, he's not
02:06 19 required to recite legal standards or memorize legal standards.

02:06 20 He explained how the patents and the comparable licenses
02:06 21 are from a comparable field of technology related to similar
02:06 22 inventions. And this is what I've put here on the screen, is
02:06 23 Paragraph 35 of their expert, Dr. Larson's, legal standard.
02:06 24 Just to illustrate, Your Honor, that it's -- this is all he
02:06 25 says. So this is what they're saying that Dr. Kiaei should

02:06 1 have included in his report. He offered a rebuttal report and
02:07 2 he offers in his opinions the same sorts of things, comparable
02:07 3 field, similar inventions.

02:07 4 On to economic comparability. Again, the law requires an
02:07 5 expert to account for differences and identify things to allow
02:07 6 the jury to discount as needed. And the degree of
02:07 7 comparability, again, is left to the jury.

02:07 8 Dr. Ugone analyzed the agreements. He explained that
02:07 9 they -- what the structure was, the dates, the amounts, the
02:07 10 parties, a number of other factors. And ultimately he
02:07 11 identified just one adjustment that he felt was needed. He
02:07 12 adjusted for the difference in the time between the
02:07 13 hypothetical negotiation and the comparable licenses. He made
02:07 14 a 5X multiplier to account for that. As to the other
02:07 15 differences, he identified the facts and he made an adjustment
02:08 16 with respect to timing.

02:08 17 And with that, Your Honor, unless you have any further
02:08 18 questions, I'll pass the podium.

02:08 19 THE COURT: I don't.

02:08 20 MR. TISHMAN: Okay. Thank you, Your Honor.

02:08 21 THE COURT: Thank you, sir.

02:08 22 Yes, sir.

02:08 23 MR. FLYNN-O'BRIEN: I think one thing that both parties'
02:08 24 presentation make clear is that there's no dispute as to the
02:08 25 relevant paragraphs in Dr. Kiaei's expert report for the CRG

02:08 1 patent. It's Paragraph 506. For the [redacted] patents it's 508
02:08 2 and 509. So we're talking about three whole paragraphs. And
02:08 3 in those paragraphs there are no citations, there are no
02:08 4 discussions, there's no pincites to the patents, there's no
02:08 5 citations to any other materials, there's no additional
02:08 6 discussion. There's a single sentence for each patent. Those
02:09 7 are the sorts of vague and conclusory statements that do not
02:09 8 belong before a jury.

02:09 9 As to Dr. Ugone, the only adjustment -- counsel on the
02:09 10 other side referred to an adjustment that Dr. Ugone made. That
02:09 11 adjustment was only related to the timing of the agreements.

02:09 12 Another problem, of course, with this, he thinks Samsung's
02:09 13 position here is that the two agreements they're relying on are
02:09 14 from 2010, nearly eight years before the hypothetical
02:09 15 negotiation. Dr. Ugone purports to make an adjustment to
02:09 16 correspond to that time difference and the fact that people's
02:09 17 usage of cell phones changed quite a bit in those eight years.

02:09 18 But he doesn't make any other adjustments. He doesn't
02:09 19 make any other analysis, assessments or adjustments to reflect
02:09 20 or accommodate the negotiating positions between the parties,
02:09 21 their -- the particular value or utility of the patents at
02:10 22 issue in those agreements versus the utility of the patents at
02:10 23 issue in this case, or any of the other sort of economic
02:10 24 analysis that you would normally expect when you have a
02:10 25 comparable agreement opinion.

02:10 1 With that, I'll turn it back over.

02:10 2 THE COURT: Anything else?

02:10 3 MR. TISHMAN: Nothing further, Your Honor.

02:10 4 (Off-the-record bench conference.)

02:12 5 THE COURT: The Court is going to deny the motion.

02:12 6 The next I have is defendant's motion with respect to --

02:12 7 I'm assuming it's Dr. Bergman, B-e-r-g-m-a-n?

02:13 8 MR. TISHMAN: Hello, again, Your Honor. Mr. Edelin is
02:13 9 going to pull up the slides. Just a moment.

02:13 10 While he's pulling them up, Your Honor, I'll just start by
02:13 11 saying this is an important but fairly straightforward motion.
02:13 12 It really -- there's a number of issues at play, but the big
02:13 13 one is, Mr. Bergman failed to apportion damages for
02:13 14 600,000 units, [REDACTED]

02:13 15 [REDACTED] if you were to
02:13 16 include the now-dropped earliest patent.

02:13 17 Of course, Your Honor knows well that the entire market
02:13 18 value rule says you cannot claim damages on the entire profits
02:14 19 of a product. You cannot claim a percentage of the entire
02:14 20 profits of a product unless you can show that the patented
02:14 21 feature alone drives demand for the product. That's exactly
02:14 22 what Mr. Bergman did with respect to the 600,000 units.

02:14 23 So what we're showing here is Dr. Prince's microeconomic
02:14 24 analysis, and we've got really two aspects of it that
02:14 25 ultimately result in \$4.72 per unit. One is the price effect.

02:14 1 That's the yellow box between the p* and the p** on the left.
02:14 2 We've also shown it on the right, in the bar chart on the right
02:14 3 as well.

02:14 4 The other aspect is the red box. The red box is the
02:14 5 quantity effect. Dr. Prince says: But for the invention and
02:14 6 the 20.9 minutes that it gives, these sales wouldn't have
02:14 7 happened; so therefore, we can take the entire profits for
02:14 8 these sales, that red box.

02:14 9 That's \$253.16 per unit. I'll show in a later slide that
02:15 10 ends up being about [REDACTED] that then gets fed into a
02:15 11 profit-splitting analysis.

02:15 12 But there's no dispute that for these -- what's in red
02:15 13 here, that entire profits for those units is being counted and
02:15 14 fed into this \$4.72 per unit figure.

02:15 15 Now, you're going to hear -- this is in the briefing as
02:15 16 well, and I think it's going to be in the presentation -- these
02:15 17 boxes are going to be drawn a little bit different, but there's
02:15 18 no dispute on the math and the facts that, as to those
02:15 19 600,000 units, they're taking the entire profits.

02:15 20 So what we're asking for, Your Honor, one aspect of our
02:15 21 motion, is to essentially -- for the lack of a better way of
02:15 22 saying it, let's get rid of the red box. Let's kill the red
02:15 23 box here.

02:15 24 So that's the first aspect of our motion. I think you'll
02:15 25 hear a bit from my colleagues on the other side about the

02:16 1 entire market value being a really big revenue number.

02:16 2 LaserDynamics says you can't take a percentage of revenues
02:16 3 or profits, and that's what they've done. They've taken a
02:16 4 percentage of the entire profits for 600,000 units.

02:16 5 You're also going to hear, well, but for the invention,
02:16 6 you wouldn't have these 20.9 minutes and you wouldn't have had
02:16 7 the 600,000 sales. So therefore it's okay to take all these
02:16 8 profits. That's exactly what LaserDynamics was about.

02:16 9 Your Honor, I didn't see anything in the opposition brief
02:16 10 about LaserDynamics. This is really our lead case in our
02:16 11 opening brief. There was no response on it. But it's very
02:16 12 analogous.

02:16 13 In that case the issue was an optical disk drive, and it
02:16 14 wasn't enough -- the Federal Circuit said, it's not enough to
02:16 15 show a laptop computer without an optical disk drive.
02:16 16 Practicing the disk discrimination method would be commercially
02:17 17 unviable. If that were sufficient, a number of other features
02:17 18 could drive demand, including a high-resolution screen. It
02:17 19 lists a number of other features.

02:17 20 That is not enough, Your Honor. And the same can be said
02:17 21 about these 600,000 units. Even without the 20.9 minutes,
02:17 22 there's a number of other features. The ability to make a
02:17 23 phone call, the screen, a number of other features.

02:17 24 Now, they're going to say, we're not really doing entire
02:17 25 market value rule. We're not saying that this feature alone

02:17 1 drives demand. But that's exactly what they're doing, Your
02:17 2 Honor. They're taking a percentage of the entire profits for
02:17 3 600,000 units.

02:17 4 There's some discussion in Theta's briefing about how they
02:17 5 do a 40 to 60 percent split to what they say further apportion
02:17 6 this. Your Honor, they do 40 to 60 percent of the entire
02:17 7 profits for 600,000 units. [REDACTED]

02:18 8 [REDACTED]
02:18 9 There's a second basis, Your Honor. So the first basis
02:18 10 being let's kill that red box. The second basis being this
02:18 11 failure to apportion 600,000 units bleeds into the entire
02:18 12 analysis. The entire damages analysis is based on this change
02:18 13 in profit that includes the profits associated with the red
02:18 14 box. [REDACTED]

02:18 15 [REDACTED] And that's the input that leads to the total
02:18 16 that I've shown in the third row on this table here, \$4.72 per
02:18 17 unit.

02:18 18 So the second basis would be the entire damages analysis
02:18 19 based on the \$4.72 should be excluded.

02:18 20 There's a third aspect of our motion, and this is very --
02:18 21 two very specific points that are somewhat unrelated, but we
02:19 22 included them in the same motion because it's all about
02:19 23 Mr. Bergman. The first one is he's not a technical expert. He
02:19 24 doesn't purport to be a technical expert.

02:19 25 But there's a lengthy discussion in his report where he

02:19 1 explains about battery manufacturing. He says manufactures
02:19 2 have reached the limit of how much power they can squeeze into
02:19 3 batteries. He's not an expert in battery technology. He's not
02:19 4 the right guy to tell the jury about that, Your Honor.

02:19 5 The next sort of similar issue relates to -- you know, we
02:19 6 were talking about just a couple paragraphs, relates to the
02:19 7 form of the license. He says that it should be a running
02:19 8 royalty. And to support that there's two things he relies on
02:19 9 that we say are improper. The first is a national aggregate
02:19 10 study by Varner. National aggregate studies like that are
02:19 11 untethered to the actual record in the case, so they should be
02:19 12 excluded. The Southern District of California did that in the
02:20 13 Carucel v. Novatel case.

02:20 14 The next one I don't really think there's a dispute here.
02:20 15 Mr. Bergman, in his report, as damages experts sometimes do,
02:20 16 refers to a Federal Circuit case to support a proposition. He
02:20 17 shouldn't be allowed to present to the jury anything about
02:20 18 Federal Circuit cases. He's not a legal expert. That's for
02:20 19 Your Honor to do, obviously.

02:20 20 So that's -- it doesn't seem like there's an agreement
02:20 21 here, looking at their opposition. But we submit that 355 and
02:20 22 356 from the report should be out, the reliance on Varner and
02:20 23 the Federal Circuit case.

02:20 24 So just to summarize, the bases of the report, this fourth
02:20 25 aspect, you can set that aside. You've already denied the

02:20 1 motions on Dr. Larson and Dr. Prince.

02:20 2 So the bases are: We should eliminate the quantity
02:20 3 effect, the red box; the whole \$4.72 has, as an input the red
02:20 4 box. So it should be eliminated as well. That's Basis 2.

02:21 5 And the third and fourth have to do with these specific
02:21 6 paragraphs that are listed in our briefing.

02:21 7 Thank you, Your Honor.

02:21 8 THE COURT: Anything else?

02:21 9 MR. TISHMAN: That's it for me, Your Honor. Unless you
02:21 10 have any questions. Thank you.

02:21 11 THE COURT: Yes, ma'am.

02:21 12 MS. DE MORY: Good afternoon, Your Honor.

02:21 13 So this will be pretty quick. [REDACTED]

02:21 14 [REDACTED]
02:21 15 [REDACTED] The analysis that was done in this
02:21 16 case does not violate the entire market value rule in any way.
02:22 17 Samsung is just mischaracterizing it or misunderstanding it.

02:22 18 So let's go ahead and -- and Samsung -- and Theta's -- I'm
02:22 19 sorry. Theta's damages analysis doesn't even rely on these
02:22 20 numbers.

02:22 21 So let's go ahead and go to the next slide.

02:22 22 So this is it. I showed you the textbook earlier. This
02:22 23 is the picture that was in the textbook. And so Dr. Prince
02:22 24 conducted a survey, and he determined what the profit would be
02:22 25 for Samsung with the 20.9 minutes and without the 20.9 minutes

02:22 1 using this model that is depicted here on the screen.

02:22 2 So go ahead and click.

02:22 3 So the first box is Samsung's profit without the benefit
02:22 4 of the inventions, and the second box he calculated is
02:22 5 Samsung's profits with the inventions. And then he did a
02:23 6 little math, and he subtracted the area between those two
02:23 7 profit numbers. It is absolutely 100 percent apportioned to
02:23 8 the exact -- exactly tied to the 20.9 minutes that Dr. Larson
02:23 9 calculated.

02:23 10 So there's one area which is how much money would Samsung
02:23 11 make with the 20.9 and one area which is how much would Samsung
02:23 12 make without the 20.9, and it really is -- all Samsung is
02:23 13 challenging --

02:23 14 If you could just click one more, Aaron.

02:23 15 -- is this --

02:23 16 One more.

02:23 17 -- whether or not the math, the difference between these
02:23 18 two boxes, Samsung's total profits with 20.9 and Samsung's
02:23 19 total profits without 20.9, include the yellow box alone or the
02:23 20 yellow- and red-shaded box. That's it.

02:24 21 It's not a violation of the entire market value rule. It
02:24 22 is that the area underneath that curve has two components,
02:24 23 price and quantity. [REDACTED]

02:24 24 [REDACTED]
02:24 25 [REDACTED]

02:24 1 [REDACTED]

02:24 2 As to the other two issues, the battery stuff, Mr. Bergman

02:24 3 did exactly what he was supposed to do. He is opining as a

02:24 4 damages expert on battery savings. He went through and he

02:24 5 studied all the literature that is in -- out there, and he's

02:24 6 going to testify about some background facts about battery

02:24 7 savings and what's happening in the market. That's what he's

02:24 8 supposed to do.

02:24 9 And as to the final issue, I don't think he's going to

02:24 10 be -- he probably will put up Georgia-Pacific on a slide. I

02:24 11 don't think he's necessarily going to be opining about the

02:24 12 cases. But the principles in those cases apply perfectly to

02:25 13 his analysis, and he's going to describe why they apply and,

02:25 14 you know, what the relative bargaining power of these parties

02:25 15 should be.

02:25 16 And so those are, I think, in limine motions; but

02:25 17 nonetheless, they should still be denied in the context of this

02:25 18 Daubert.

02:25 19 MR. TISHMAN: If we can just keep this slide, Your Honor.

02:25 20 Just one point. With respect to this, I guess, orange or

02:25 21 red box, I didn't hear a dispute that, as to that box, they're

02:25 22 taking a percent of the entire profits for those 600,000 units.

02:25 23 That violates the entire market value rule, and there's no law

02:25 24 that says you can violate the entire market value rule for just

02:25 25 some of the units and not the others.

02:25 1 With that, Your Honor, unless you have any questions.

02:25 2 THE COURT: A response to that?

02:25 3 MS. DE MORY: It's not the entire market value. It is the
02:25 4 area under the curve, which is the difference -- it's just
02:25 5 calculating the difference under a curve essentially, which is
02:25 6 what's the total profit with the 20 minutes and what's the
02:26 7 total profit without the 20 minutes. And that's what's here.
02:26 8 And the two -- the axes happen to be quantity and price because
02:26 9 that's how you calculate profit.

02:26 10 THE COURT: Are you asking for the entire amount of the
02:26 11 profits that the 27 (sic) minutes allegedly gives you -- are
02:26 12 you asking for the entire profit increase that you allege
02:26 13 Samsung enjoys from the 27 (sic) minutes?

02:26 14 MS. DE MORY: It's apportioned so it is exactly the amount
02:26 15 that is tied to the 20 minutes, the profit that is tied to the
02:26 16 20 minutes.

02:26 17 THE COURT: Is it all --

02:26 18 MS. DE MORY: No. It's the difference in profits between
02:26 19 if they had the 20 minutes and if they didn't have the
02:26 20 20 minutes.

02:26 21 THE COURT: And are you asking for all of the profits?

02:26 22 MS. DE MORY: No. And then that is further apportioned by
02:26 23 Dr. Bergman otherwise in his report. He actually apportions it
02:26 24 further, which is he said they would have agreed to a 40/60
02:26 25 split after that. So it is not -- we're not even at -- even

02:26 1 that is not accurate. So...

02:26 2 THE COURT: Okay. Anything else, counsel?

02:26 3 MR. TISHMAN: Your Honor, I think the issue is they're
02:27 4 asking for a percentage of the entire profits.

02:27 5 THE COURT: That's a step. But then they go on to
02:27 6 apportion.

02:27 7 MR. TISHMAN: That's the percentage. That's the 40 to 60,
02:27 8 is the percentage of the entire profits of this orange box.

02:27 9 THE COURT: Well, it's a portion -- it's -- they want X
02:27 10 percent -- or they say the parties would have agreed to X
02:27 11 percent of the increase in profits you made off of all of the
02:27 12 sales of the products as a result of the minutes, if I
02:27 13 understand the damages theory correctly.

02:27 14 MS. DE MORY: Yes.

02:27 15 THE COURT: So they have apportioned the value of the
02:27 16 patent in the format of the 27 minutes and used a formula to
02:27 17 then say this is the amount of money that Samsung obtained as a
02:27 18 direct result of the patented feature on all their phones. And
02:28 19 that they wouldn't have gotten -- but for this patent, they
02:28 20 wouldn't have had that increase. And then we divide up. I'm
02:28 21 not sure what your problem with that is.

02:28 22 MR. TISHMAN: So --

02:28 23 THE COURT: You may disagree, for example, with the
02:28 24 methodology of the way he did it or whatever that is. But here
02:28 25 he is -- he has taken the feature and said -- because the

02:28 1 profit -- unlike, for example, you know, the Russian nesting
02:28 2 doll and all that stuff and where, you know, the -- as
02:28 3 Mr. Cordell and team knows, I was actually modestly involved
02:28 4 with some of the cases in the -- in San Diego that this came
02:28 5 from. So I'm probably more familiar with this or think I am
02:28 6 more familiar with this.

02:28 7 But the apportionment here is not like in the famous case,
02:28 8 the date picker where you were saying you have Outlook and
02:28 9 Outlook is worth X dollars. And that what is the date feature
02:29 10 worth -- date-picking feature worth? And then how do we divide
02:29 11 up what that -- how much did the patent contribute to the
02:29 12 date-picking feature? Let's say it's 100 percent. So now how
02:29 13 much is the date feature worth to Outlook? And then how do we
02:29 14 divide up the amount of money we made off that?

02:29 15 Here, as I understand their theory, it is the sales that
02:29 16 Samsung made X number more dollars as a result of the
02:29 17 improvement that the patent provided for -- of the entire
02:29 18 number of sales. I'm not sure where the apportionment comes
02:29 19 in.

02:29 20 MR. TISHMAN: The issue is that the bottom line here is
02:29 21 costs, the top line is price. And for these orange ones,
02:29 22 that's 600,000 units, they are taking 100 percent of that as
02:29 23 the input into a later 40 to 60 percent split.

02:29 24 THE COURT: Well, your client got 100 percent of the money
02:29 25 they made from the sale of those 600,000 units. And what

02:29 1 they're saying is the way they've done it is that their patent
02:30 2 allowed for a delta of more dollars, which is that box, and
02:30 3 they want to split that.

02:30 4 If I understand this -- and maybe I'm misunderstanding,
02:30 5 but that's what I think I'm hearing.

02:30 6 MR. CORDELL: This is what you don't want your partners to
02:30 7 stand up and do, is to get up and argue with you. But, Your
02:30 8 Honor, I think the disconnect here is that, for the orange box,
02:30 9 they're asking for all of Outlook.

02:30 10 THE COURT: But I think what they're saying is, unlike the
02:30 11 date picker, which has only added X value, that Microsoft was
02:30 12 able to sell -- Microsoft would have been able to sell -- I'll
02:30 13 make up a number -- \$100 million worth of Outlook. Because of
02:30 14 the date-picker feature itself, they were able to sell
02:30 15 \$120 million worth, and what they want to divide up is the
02:30 16 extra \$20 million the patented feature provided to Microsoft
02:31 17 because it increased their sales by that number of dollars.

02:31 18 MR. CORDELL: Correct. That's exactly what they're doing.

02:31 19 THE COURT: And I'm not -- and I'm not sure why that's not
02:31 20 okay.

02:31 21 MR. TISHMAN: So it's exactly what LaserDynamics says.
02:31 22 For Quanta here, those guys wouldn't have sold any of their
02:31 23 laptops if it weren't for the ODD with the disk discrimination
02:31 24 method because it wouldn't be considered commercially viable.
02:31 25 And the Federal Circuit said that's not enough. Any feature

02:31 1 you could say that about. You have to show that that alone
02:31 2 drives demand.

02:31 3 THE COURT: Well, and I don't know that their expert is
02:31 4 going to be able to do that, but that's not what we're arguing
02:31 5 here. I mean, their argument is that that is what he's going
02:31 6 to say.

02:31 7 MR. TISHMAN: He does not say that 20.9 minutes alone
02:31 8 drives demand. He admitted in deposition -- this is in the
02:31 9 briefing -- that he does not allege that the entire market
02:31 10 value comes from 20.9 minutes.

02:31 11 THE COURT: No. I think he says the increase in
02:31 12 the profit -- not profits, the increase in the amount of
02:32 13 dollars Samsung got was the -- was -- there was X without it,
02:32 14 there's X plus Y with it, and they want to share Y, is the way
02:32 15 I see it in the simple terms.

02:32 16 And if that's correct, then I'm -- if my understanding of
02:32 17 what they're arguing is correct, then I'm going to deny your
02:32 18 Daubert motion.

02:32 19 MR. TISHMAN: I believe that your understanding is correct
02:32 20 with the caveat that, for the red box there, it's 100 percent
02:32 21 of them -- 100 percent of those profits are what's fed into a
02:32 22 40/60 profit split.

02:32 23 THE COURT: 100 percent of the profits, the additional
02:32 24 profits. If I'm wrong on that, I need to know. But it's
02:32 25 100 percent of the additional profits that they are going to

02:32 1 credit to the patented feature.

02:32 2 MR. TISHMAN: All of the profits -- that's what
02:32 3 LaserDynamics was. All of the profits were additional profits.
02:32 4 They wouldn't have sold any but for the invention, so that's
02:32 5 not enough.

02:32 6 THE COURT: Yeah, but this is a different fact scenario
02:32 7 than that. Here -- and we got to wind this up because I've got
02:32 8 a Markman in a half hour. But here, they are asking for a
02:33 9 percentage of the additional profit their person says.

02:33 10 Now, if you want, you can cross-examine on his
02:33 11 methodology, how did he prove that the patent was responsible
02:33 12 for that X percent increase, and so your number is nuts.
02:33 13 You'll get to do that at cross.

02:33 14 But for Daubert purposes, I'm going to deny your motion
02:33 15 with regard to the methodology. I understand the method and I
02:33 16 don't think it's impermissible.

02:33 17 MR. TISHMAN: Okay. Thank you, Your Honor.

02:33 18 THE COURT: So next up I have -- because you haven't
02:33 19 beaten up on Mr. Bergman enough, I have Daubert -- a Daubert on
02:33 20 Smith and Bergman.

02:33 21 MR. TISHMAN: That's me as well, Your Honor. And I think
02:33 22 I can be quick. While he's flipping to the slides, I'll just
02:33 23 get started.

02:33 24 Our papers are pretty extensive on this, but it's not
02:33 25 really a damages issue. That's why we split it up this way.

02:33 1 This has to do with both Dr. Smith and Mr. Bergman have a lot
02:33 2 of discussion in their reports about citations to non-asserted
02:34 3 patents.

02:34 4 And there's really two issues with that. One is relevance
02:34 5 and one is reliability. I'll try to do both of them quickly.

02:34 6 On relevance, I'll just show you what they do. Smith
02:34 7 gives a table from Google patents. He identifies a bunch of
02:34 8 citations to patents in the Tsividis patent family. He says
02:34 9 there's at least 26 citations to them.

02:34 10 Sorry. I'm not publishing again.

02:34 11 Bergman says something similar, but he says the '962
02:34 12 patent actually was cited 26 times. So I think there's a
02:34 13 disconnect there, and we'll get to that in a bit, Your Honor.

02:34 14 But on the relevance issue, they give three main relevance
02:34 15 arguments. One is validity. The other is knowledge of the
02:34 16 patents. The third is bargaining position at the hypothetical
02:34 17 negotiation.

02:34 18 On validity, really the thesis of Dr. Smith is it shows
02:35 19 that other people held these patents as important. But when
02:35 20 you're talking about secondary considerations and
02:35 21 nonobviousness, holding non-related -- or related but
02:35 22 non-asserted patents important is not the same as the actual
02:35 23 asserted patents. So there's some relevance issues and
02:35 24 likelihood of confusion here.

02:35 25 On knowledge of the patents it's really the same issue.

02:35 1 We're looking at a table here. Most of these citations are
02:35 2 before the asserted patents even issued. So --

02:35 3 THE COURT: Let me jump ahead here for just a second. I
02:35 4 don't really see this. I could be wrong. You got a lot of
02:35 5 lawyers in the room who are smarter than I am. But I don't
02:35 6 really see this, although I don't know why the other patents
02:35 7 would come in.

02:35 8 I don't see this as a Daubert as much as I do just a flat
02:35 9 issue of relevance. So that if -- and maybe I don't have the
02:35 10 connect between they said this, which is irrelevant, to get to
02:36 11 their opinion, and that's the point.

02:36 12 But it seems to me that if the expert, Smith or Bergman,
02:36 13 want to talk about, you know, validity and they go into
02:36 14 something like those other patents that you think are
02:36 15 irrelevant, Mr. Cordell or Mr. Black, who are not shy people,
02:36 16 will be -- can easily stand up and say, objection, Your Honor.
02:36 17 And then they can take him on voir dire or they can explain to
02:36 18 me why they're irrelevant or do it that way.

02:36 19 But I feel like I would understand that objection a lot
02:36 20 better in the context of when I'm listening to the testimony
02:36 21 than I am just arbitrarily whacking things in the form of a
02:36 22 Daubert.

02:36 23 So I'm going to deny your Daubert without any prejudice to
02:36 24 you all being able to make objection -- whatever is in here it
02:37 25 can be made as an objection during trial.

02:37 1 And, now, I think we're going to, at some point, get to
02:37 2 the motions in limine if we have time here. I will let you all
02:37 3 know that when one of you -- I'll pick on Mr. Cordell again --
02:37 4 stand up and says, Your Honor, that question violates Motion in
02:37 5 Limine 713, I really don't know what any of the motions in
02:37 6 limine were by number.

02:37 7 If something violates a motion in limine so severely that
02:37 8 you need to object, you just need to say may we approach or
02:37 9 something like that, and I can take it up, if you want me to
02:37 10 take it up outside of the presence of the jury. But I will --
02:37 11 I'm telling you in advance I will not know what Motion in
02:37 12 Limine 16 was or why the question violates it.

02:37 13 And so I'm denying the motion -- the Daubert motion
02:37 14 without prejudice.

02:37 15 Now, let me see what we have next.

02:37 16 MR. TISHMAN: And, Your Honor, there is a reliability
02:37 17 aspect to this. I know it's separate from the relevance. If
02:38 18 you're -- we have your ruling. I just want to make sure you're
02:38 19 aware there's a reliability aspect to this as well.

02:38 20 THE COURT: To the extent they're unreliable, I think it's
02:38 21 because it's not relevant. And from what you've shown me so
02:38 22 far, I don't know why some of that stuff is relevant, but I
02:38 23 don't know why it's relevant. And another lawyer's going to
02:38 24 get up and say it is relevant, and I won't really know any
02:38 25 better then why -- I won't know who to believe.

02:38 1 But I promise you, I actually most of the time do pay
02:38 2 attention during trial. And so if you're asking questions
02:38 3 and -- if they ask a question and you object because it's
02:38 4 irrelevant or something, I promise you, I will rule on it then.

02:38 5 MR. TISHMAN: Okay. Thank you, Your Honor.

02:38 6 THE COURT: So let me -- give me one second.

02:38 7 Let's do this. Let me ask anyone from the defendant who's
02:39 8 going to handle this, I have -- oh, I have -- I'm sorry, for
02:39 9 the plaintiff, there's something about failure to produce
02:39 10 documents with regard to Hutchinson and Bedford. I'm not sure
02:39 11 what that is.

02:39 12 Yes, ma'am?

02:39 13 MS. DE MORY: Yes. So this was the issue that I had stood
02:39 14 up prematurely and said a lot of the issues in those written
02:39 15 objections overlap with some things that are even handled in
02:39 16 better context in the context of our MILs. And so we were
02:39 17 going to defer consideration of those issues in the context
02:39 18 of -- until in the context of the MILs. And there may be one
02:40 19 still to take up, which is the Bedford issue.

02:40 20 THE COURT: Okay. Let's do that. And give me just one --
02:40 21 you can come up.

02:40 22 (Off-the-record bench conference.)

02:40 23 THE COURT: Yes, sir?

02:41 24 MR. BUNSOW: Your Honor, I'd like to address
02:41 25 Mr. Hutchinson, who is a late disclosed, undiscovered witness

02:41 1 from Qualcomm.

02:41 2 And the last time this came up, we said we wanted to take
02:41 3 his deposition if he was going to testify. Mr. Black promised
02:41 4 you, no problem. If he's going to testify, we'll make him
02:41 5 available for deposition.

02:41 6 Since then we've been asking almost every day if we can
02:41 7 have his deposition. I'd like to know at this late stage: Is
02:41 8 he going to testify or not; and if he is, when can we take his
02:41 9 deposition?

02:41 10 Now, the subject matter of his testimony is a whole
02:41 11 'nother issue, but at the very least, if they think they're
02:41 12 going to put him up, we need to take his deposition.

02:41 13 THE COURT: I got it.

02:41 14 MR. CORDELL: So what Mr. Bunsow said was almost right.
02:41 15 Mr. Black did say that it would be no problem back in August,
02:41 16 and we heard nothing for months and months and months. We
02:42 17 exchanged witness lists a few weeks ago. Mr. Hutchinson was on
02:42 18 our list and now they've -- they want to take his deposition.

02:42 19 We've been working with his lawyers. He's a Qualcomm
02:42 20 employee. We are working through them, and they've said he's
02:42 21 available. So there should be no problem to take his
02:42 22 deposition in the next few days.

02:42 23 THE COURT: Okay. There you go. Easy-peasy.

02:42 24 And I was checking with Jeff, to the extent whatever we
02:42 25 don't get finished today, we'll take up Thursday afternoon by

02:42 1 Zoom, so...

02:42 2 MR. CORDELL: And I can dispose of Mr. Bedford as well,
02:42 3 easily, I think. We had this discussion on December 16 and we
02:42 4 offered to put him up for deposition, and I thought the
02:42 5 plaintiff had accepted that. So I think it should be pretty
02:42 6 straightforward.

02:42 7 MS. DE MORY: Your Honor, we are willing -- what happened
02:42 8 on our last hearing was that Mr. Cordell said that they were
02:42 9 going to replace their corporate rep, and you said things
02:42 10 happen, and that's fine. And you also said what's he really
02:42 11 going to say? Hi, I work for Samsung, this is Samsung.

02:42 12 The problem is, they have a proffer which is that he's not
02:43 13 just going to say I work for Samsung. And we didn't take this
02:43 14 up at the last hearing because we had it in our objections.

02:43 15 So the issue is he's going to do three things. He's going
02:43 16 to introduce Samsung, fine. We'll take his deposition on that,
02:43 17 we'll hear what he has to say.

02:43 18 The second thing he's going to do is he is going to
02:43 19 replace Mr. Hawke who was going to be their designee, and he
02:43 20 was a 30(b) (6) witness. So he's going to testify -- and they
02:43 21 claim that Mr. Hawke is unavailable. So he's going to testify
02:43 22 for Mr. Hawke. And they say he's going to testify consistently
02:43 23 with him. He's at least a marketing person, which Mr. Bedford
02:43 24 is a marketing person, so that -- you know, it doesn't seem
02:43 25 that offensive. And he says he's unavailable.

02:43 1 The third person, though, they say he's going to testify
02:43 2 for Mr. Lim. Now, you heard about some of Mr. Lim's testimony
02:43 3 earlier. Mr. Lim is a witness, a lawyer who was offered as a
02:44 4 30(b) (6) witness on issues of Samsung's knowledge of the
02:44 5 patents. All he did was read the interrogatory responses and
02:44 6 answer those interrogatory -- consistent with those
02:44 7 interrogatory responses which we don't believe are admissible.
02:44 8 It will be no more admissible if Mr. Bedford comes and now says
02:44 9 what Mr. Lim said about the interrogatory responses that are
02:44 10 not admissible.

02:44 11 And we were otherwise precluded from asking any questions
02:44 12 about who learned of the applications, what did they do after
02:44 13 they learned about them, what did they -- otherwise.

02:44 14 And so what we're getting now is -- and we have no
02:44 15 evidence that Mr. Lim is unavailable. They have never said
02:44 16 he's not available.

02:44 17 So what they're trying to do with Mr. Bedford is bring in
02:44 18 somebody to replace basically 30(b) (6) testimony that they
02:44 19 don't like. We think it's improper. We think it's
02:44 20 prejudicial. The Lim testimony should be played to the extent
02:44 21 it's admissible. And otherwise they should not be able to fix
02:44 22 that through a new corporate rep when the other witness is not
02:44 23 unavailable.

02:45 24 MR. CORDELL: 30(b) (6) testimony, as I understand the
02:45 25 rules, is usable by them for whatever purpose they choose.

02:45 1 THE COURT: It is.

02:45 2 MR. CORDELL: I don't know exactly why that's --

02:45 3 THE COURT: Yeah. I'm not really following -- they're not
02:45 4 going to present him at trial as a 30(b) (6) witness.

02:45 5 MR. CORDELL: Right.

02:45 6 THE COURT: He's just going to be him.

02:45 7 MS. DE MORY: Well, he's going to testify to the things
02:45 8 that Mr. Lim testified to.

02:45 9 THE COURT: No. He's not going to testify -- if he
02:45 10 testifies, you can -- if he says something that is consistent
02:45 11 with what the 30(b) (6) witness said, you're fine. If he says
02:45 12 something contrary to what the 30(b) (6) witness said, you can
02:45 13 impeach him with the 30(b) (6) deposition.

02:45 14 MS. DE MORY: We don't even believe the 30(b) (6) stuff is
02:45 15 admissible as it is.

02:45 16 THE COURT: You don't what?

02:45 17 MS. DE MORY: We do not -- it is our position that that
02:45 18 testimony is not admissible in the first place. He had no
02:45 19 firsthand knowledge. He just read the interrogatory
02:45 20 response --

02:45 21 THE COURT: Well, the 30(b) (6) deposition isn't firsthand
02:45 22 knowledge. It's corporate knowledge.

02:45 23 And so -- and I would -- I might even go so far as to say
02:45 24 that if this gentleman gets on as a corporate representative,
02:45 25 which he would be -- he's not 30(b) (6), but he would be a

02:46 1 corporate representative.

02:46 2 And if he says -- I'm making this up -- Samsung not only
02:46 3 knew about all these three patents, we infringed them on
02:46 4 purpose and we had a party the week after we found out about
02:46 5 them, if that was -- if the corporate representative had said
02:46 6 the opposite and you showed me that, there's a good chance I
02:46 7 would strike that and tell the jury they have to disregard it
02:46 8 because the corporation has already taken a different position
02:46 9 and what a 30(b)(6) is.

02:46 10 So the way I see it is, this gentleman is going to be a
02:46 11 live person, a human, saying whatever that Samsung wants him to
02:46 12 say about Samsung and whatever they did. But -- and you get to
02:46 13 depose him tomorrow or Thursday or Friday, whenever, about all
02:46 14 that.

02:46 15 But if he says something that's incongruent in any way
02:46 16 from what the corporate deposition said, you have that
02:47 17 deposition and you can either impeach him with it or I'll
02:47 18 strike it because that's why we take 30(b)(6)s.

02:47 19 This guy's not going to be a 30(b)(6).

02:47 20 MS. DE MORY: I understand that. And this is why I wanted
02:47 21 to do it in the context of the motions in limine because that
02:47 22 30(b)(6) deposition is the one that Mr. Bunsow already raised,
02:47 23 that you have cautioned them about twice in other proceedings,
02:47 24 which is they basically instructed him not to answer every
02:47 25 question except for what he read from those interrogatories

02:47 1 responses.

02:47 2 THE COURT: Well, if Mr. Cordell asks Mr. X, whatever,
02:47 3 whoever he puts on a question that you had asked the corporate
02:47 4 witness and they instructed that corporate witness not to
02:47 5 answer it, he's not going to be allowed to answer it either.

02:47 6 If a corporate witness refused to answer a question
02:47 7 that -- now, let me say, if the objection was that's outside
02:47 8 the scope of the 30(b) (6), he's not the right person, blah,
02:47 9 blah, that's a fuss we'd have to have.

02:47 10 But if you asked them -- I'm making it up again -- if you
02:47 11 asked the corporate representative: On what date did you know
02:48 12 X?

02:48 13 And they said: Don't answer that question.

02:48 14 I don't know why they would, but you're telling me they
02:48 15 did. If they say -- then Mr. Cordell doesn't get to put on
02:48 16 someone from Samsung to say something that would contradict.
02:48 17 They are in concrete with respect to the 30(b) (6). Whatever
02:48 18 positions they took as lawyers and Samsung at the 30(b) (6) is
02:48 19 what the jury's going to hear.

02:48 20 Anything else?

02:48 21 MR. CORDELL: Good from our perspective, Your Honor.
02:48 22 Thank you.

02:48 23 THE COURT: Okay.

02:48 24 MR. CORDELL: There is one other minor housekeeping
02:48 25 matter. We had submitted a pretrial order a couple weeks back

02:48 1 and in it we had the order of proof, being the way we are very
02:48 2 accustomed to doing it, where the plaintiff puts on the case.
02:48 3 We then respond and put on our affirmative case. And then they
02:48 4 rebut our affirmative case.

02:48 5 It now seems that the plaintiff wants to have a rebuttal
02:49 6 that includes their affirmative burdens. So they want to put
02:49 7 on an infringement case, hear our response. And then in
02:49 8 rebuttal they want to go back to their infringement case.

02:49 9 THE COURT: Their rebuttal would be a rebuttal.

02:49 10 MR. CORDELL: Okay.

02:49 11 THE COURT: A rebuttal is a rebuttal. Now, I allow
02:49 12 rebuttal on everything. In other words, if you -- when you put
02:49 13 your damages guy on, they can put a damages -- their damages
02:49 14 expert back on to rebut what it was he said. Or she said,
02:49 15 whichever.

02:49 16 But the rebuttal phase for the plaintiff will be rebuttal
02:49 17 of what you all raised in your case-in-chief.

02:49 18 MR. CORDELL: So you're going to allow them to rebut on
02:49 19 their affirmative burdens.

02:49 20 THE COURT: I'm going to allow them to rebut what you all
02:49 21 said during their rebuttal, yes.

02:49 22 MR. CORDELL: Do we then get a rebuttal case?

02:49 23 THE COURT: You do not.

02:49 24 MR. CORDELL: Well, what about our validity?

02:49 25 THE COURT: I understand. But I've -- it has to quit

02:49 1 somewhere. And I'm going to allow them to rebut on those
02:50 2 issues and then we'll be done.

02:50 3 MR. CORDELL: Okay.

02:50 4 THE COURT: Except I checked with -- maybe we're all
02:50 5 wrong. I checked with many judges who try a lot of these
02:50 6 cases, and to a person they all said that's the way they do it.
02:50 7 And so I have adopted the procedure of every judge that I know
02:50 8 who's doing it.

02:50 9 MR. CORDELL: Well, not to put too fine a point on it,
02:50 10 Your Honor, but I believe if you're going to allow a rebuttal
02:50 11 on affirmative burdens, that has to apply to both sides.

02:50 12 THE COURT: I know that's your position.

02:50 13 MR. CORDELL: Understood.

02:50 14 MR. BUNSOW: I'll just say that I don't know how many
02:50 15 cases I've tried, but a few. And it's always as you described.

02:50 16 THE COURT: Counsel, you've won.

02:50 17 (Laughter.)

02:50 18 THE COURT: So, Mr. Cordell, I don't mean to be glib. I
02:50 19 understand your point. I've thought it through and that's just
02:50 20 the way I do it.

02:50 21 MR. CORDELL: Understood.

02:50 22 THE COURT: And maybe someday -- the Circuit has certainly
02:50 23 not been reluctant in other areas to tell me when they don't
02:51 24 think I'm doing it correctly. And so this might be another
02:51 25 opportunity. But maybe they might -- who knows? Lightning may

02:51 1 strike and they might say it's okay. So there's that
02:51 2 possibility too.

02:51 3 So what we're going to do is, we'll take up the motions in
02:51 4 limine on Thursday afternoon. And I'll go through them again
02:51 5 before now and then. And let me think if there's anything.

02:51 6 Let me just finish with this on the motions in limine so
02:51 7 you know and I don't forget to tell you. Most things I see in
02:51 8 motions in limine, I see as only a motion in limine. Meaning
02:51 9 if I say something can't come in, it means until one of you
02:51 10 says we -- Judge, we need to approach. We need to raise this
02:51 11 because we intend now to offer this evidence and here's why.

02:51 12 So if I grant the motion in limine, I will tell you if
02:52 13 it's -- I'm granting it, meaning it's not coming in ever. Like
02:52 14 if this were a car accident case, you know, proof of the fact
02:52 15 someone was insured is not coming in. Yes. It's a motion in
02:52 16 limine, but it it's not coming in.

02:52 17 But in this case when I'm granting the motions in limine,
02:52 18 keep in mind that if I -- my opinion of motion in limine is I'm
02:52 19 going to -- if they're things I think that I can't fix in front
02:52 20 of the jury by just ruling on them, I will grant the motion in
02:52 21 limine.

02:52 22 But you all will be free to ask me to allow the
02:52 23 information in. And at that point you can say the reason it
02:52 24 comes in now is someone testified or here's the relevance or
02:52 25 whatever, and I'll be much better able to understand why

02:52 1 something may or may not be admissible at that point.

02:52 2 So the fact that you win a motion in limine doesn't
02:52 3 necessarily mean it's not ever going to come in. It just means
02:52 4 you'll have to approach the bench first.

02:53 5 Is there anything else we need to take up?

02:53 6 MS. DE MORY: No, Your Honor.

02:53 7 MR. CORDELL: Not at this time.

02:53 8 THE COURT: Well, this was one of those days where I won't
02:53 9 even get paid. It was a great pleasure. We'll talk on
02:53 10 Thursday.

02:53 11 THE BAILIFF: All rise.

02:53 12 (Hearing adjourned at 2:53 p.m.)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

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4 I, Kristie M. Davis, Official Court Reporter for the
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12

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